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REPORTS
OF CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF TENNESSEE,
FOR THE
WESTERN DIVISION,
APRIL TERM, 1883.
AND FOR THE
EASTERN DIVISION,
SEPTEMBER TERM, 1883.

BENJAMIN J. LEA,
ATTORNEY-GENERAL AND REPORTER.

VOLUME XI. 79 Tenn.

NASHVILLE:
ALBERT B. TAVEL, LAW PUBLISHER.
1883.

Dec 1-2

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF TENNESSEE,

FOR THE

WESTERN DIVISION,

JACKSON, APRIL TERM, 1883.

JOHN WILLETT *v.* CORPORATION OF BELLVILLE.

CORPORATIONS, MUNICIPAL. *Change of limits. Chancery courts.* The courts of chancery in this State are not authorized by the act of 1871, ch. 54, to change the territorial limits of a municipal corporation.

FROM CROCKETT.

Appeal in error from the Circuit Court of Crockett county. J. T. CARTHEL, J.

JOHN W. BUFORD for Willett.

COOPER, BUCHANAN & SPENCE for Bellville.

COOPER, J., delivered the opinion of the court.

This is a petition by Willett to the circuit court to supersede a warrant to distrain his property for
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taxes alleged to be due the municipal corporation of Bellville. The town of Bellville was incorporated by an act of the Legislature passed in 1869, and specifically designating its boundaries. The land of the petitioner, on which the taxes were assessed, was included in the boundaries. In the year 1873 the corporate authorities filed a petition in the chancery court, under the act of 1871, ch. 54, praying that the charter "be altered, amended and changed." Upon the hearing of this petition of the corporate authorities on May 30, 1873, the chancellor made an order or decree changing the boundary lines of the town, designating them by metes and bounds, so that the land of the petitioner on which the taxes in controversy were assessed was excluded from the corporate limits. The only question in the case is whether this change was valid. The circuit judge thought not, and dismissed the petition on motion. The petitioner appealed.

Shortly after the adoption of the new Constitution of 1870, the Legislature undertook by the act of 1871, ch. 54, to confer upon the chancery court the power to create and organize corporations, both private and municipal. Under the State Constitution of 1834, this court had held that the power to grant charters of incorporation was vested exclusively in the Legislature, and could not be delegated: *State v. Armstrong*, 3 Sneed, 634. On the other hand, it was also decided that the Legislature might authorize the county court to organize a municipal corporation under an act fully defining the powers, privileges

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and immunities of the corporations thus organized, the metes and bounds of the territorial limits of the municipality being designated in the petition of the inhabitants for its organization: *Mayor of Morristown v. Shelton*, 1 Head, 24. The same questions were raised by the act of 1871, ch. 54, and were again considered and determined under the Constitution of 1870. And the courts reached precisely the same conclusion, that the power to incorporate was legislative and could not be delegated, while the Legislature might, by general laws, provide "for the organization of all corporations created" after the adoption of the new Constitution: *Chadwell et al., ex parte*, 3 Baxt., 98; S. C., 1 Tenn. Ch. 95; *ex parte Burns*, 1 Tenn. Ch. 83. The act of 1871 was declared to be unconstitutional and void in so far as it undertook to confer upon the court of chancery the power to create corporations, in the sense of granting to them corporate franchises.

The authority which the act of 1871 undertook to give to the chancery court in relation to municipal corporations is contained in sections 6, 7 and 8. By the first of these sections, when the inhabitants of any town or village desired to have the same incorporated, any three of the inhabitants might apply to the chancery court, and that court might appoint commissioners to fix the boundaries of the town, who should make a report to the clerk of the court, whereupon an election was to be held in the mode prescribed, and if a majority of the votes within the boundaries should be in favor of the corporation, the

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court might declare the town to be incorporated. The next section commences thus: "The chancery courts of this State are authorized to alter, amend or revise the charter of any town or village incorporated by said court, or by act of the Legislature, on application of the authorities of said incorporated town." The third section is: "The powers and privileges of incorporated towns created by authority of this act, shall be as prescribed in the Code of Tennessee from section 1358 to section 1399 inclusive." The sections referred to relate to municipal corporations, prescribing their powers and mode of organization. By their provisions, the boundaries of the municipality are to be designated by the petitioners, and determined by a vote of the inhabitants.

When sections 6 and 8 of the act of 1871 are read in connection, it is obvious that the Legislature creates, and the chancery court only organizes the corporations formed under them. The seventh section in authorizing the court "to alter, amend or revise" an existing charter goes beyond this, and is unconstitutional and void. For, as said by this court in *Mayor of Morristown v. Shelton*, the court, whose province is only to organize, cannot "add to or diminish the powers, privileges and immunities granted, nor make the least change of any kind in the charter" of the Legislature. For to do so would be to make a different corporation from the one prescribed by the Legislature, and would be to create, not to organize.

This is conceded by the counsel of the appellant

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in his argument in this court, but he ingeniously insists that a change of the boundaries of the town would not be amenable to this objection, and that the change made by the chancery court, by which his client's land was thrown outside of the limits of the municipality, was valid. Such a change, however, would not be, in any proper sense, to "alter, amend or revise the charter." For the court in the *Morristown* case distinguish between the charter created by the Legislature, and the localization of the town by boundaries, which was left to the vote of the inhabitants. Both the general act embodied in the Code in relation to municipal corporations, and the act of 1871, leave the locality to be determined by the resident voters. No other mode is anywhere designated, and if it be conceded that the Legislature might have clothed the chancery court with authority to enlarge or diminish the boundaries of a municipal corporation upon the application of the corporate authorities, it clearly has not done so by the provisions of the act under consideration. The boundaries of a municipal corporation as fixed by the Legislature in the charter cannot be changed except by the Legislature, or in the mode specifically prescribed by the Legislature. The corporate authorities cannot change them without the consent of the government: *Norris v. Mayor of Smithville*, 1 Swan, 164; *McCallie v. Mayor of Chattanooga*, 3 Head, 318. Nor can the court of chancery upon the application of the corporate authorities unless expressly authorized, if at all. Judgment affirmed.

Campbell v. Hubbard.

PARKER CAMPBELL v. J. W. HUBBARD.

1. SUPREME COURT PRACTICE. *Revivor. Non-resident heirs.* The non-resident heirs of the appellant in an action of replevin, who was the defendant below and who died pending the appeal in this court, may revive the suit in their names, if no person will administer on the estate in this State.
2. SAME. *Same. Plea.* Upon motion made to revive, the appellee may plead that the persons moving are not the heirs or all the heirs of the deceased, and, upon issue joined on the plea, the proof of heirship may be made in open court, or by depositions taken on notice, or before the clerk upon a reference to him for the purpose, the latter being the most convenient mode.
3. SAME. *Same. Same.* It is not a good plea to the motion to revive that the appellant had made a will in the State of his domicil, which had been probated in that State, and that certain persons named therein had qualified as executors thereof under the laws of that State.

FROM CROCKETT.

Appeal in error from the Circuit Court of Crockett county. J. T. CARTEL, J.

C. C. MOSS for Campbell.

LATTA & RICHARDSON, W. H. BIGGS and W. I. McFARLAND for Hubbard.

COOPER, J., delivered the opinion of the court.

Action of replevin by Hubbard against Campbell, in which the verdict and judgment were in favor of the plaintiff, and defendant appealed in error. Since the appeal Campbell has died, and certain persons as

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his heirs have moved the court to revive the suit in their names, no person having been found willing to administer in this State. Hubbard resists the revivor by pleading that the persons applying to revive are not the heirs at law, nor the sole heirs of Parker Campbell, deceased. He further files a plea to the effect that Parker Campbell died a citizen of the State of Virginia, having made a will which has been probated in that State, and certain persons named have qualified under the laws of Virginia as executors of said will, and that the suit should be revived in their names, and not the names of the heirs at law.

By statute "no appeal or writ of error in any cause or court shall abate by the death of either plaintiff or defendant, but may be revived by or against the heir, personal representative, or assignee," in the mode prescribed: Code, sec. 2854. The action may be revived by the proper person, entitled to decedent's place, by motion alone. And by the adverse party against such proper person by consent of that person on mere motion; and without consent by *scire facias* or notice: Code, secs. 2855, 2856. If no person will administer on the estate of a deceased plaintiff or defendant, the suit may be revived against the heirs of the decedent: Code, sec. 2849. Rules of practice have been adopted by this court with a view to the enforcement of the provisions of the statutes where the person against whom the suit is sought to be revived is a non-resident of the State: 1 Heis., 786.

These statutory provisions are plain enough on their face, and have been repeatedly acted on by the court.

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It has been held that the heirs of a deceased plaintiff may revive the suit in their names when no person will administer on the estate: *Boyd v. Titzer*, 6 Cold., 568. And that a suit may be revived against the heirs of a deceased defendant: *Brown v. Rocco*, 9 Heis., 187. The statutes, it has also been held, equally apply where the persons by or against whom the revivor is sought are non-residents of the State: *Foster v. Burem*, 1 Heis., 783. And to the very character of case now before the court in a replevin suit: *Edgington v. Jamison*, 2 Lea, 569.

Under these statutes, where persons claiming to be the proper representatives of deceased parties present themselves and move to revive, the opposing litigant may resist the revivor upon any sufficient ground, such as that they are not the heirs or all the heirs, and the court must, in acting upon the motion to revive, pass upon and decide the question: *Mayfield v. Stephenson*, 6 Baxt., 397; *Berrigan v. Fleming*, 2 Lea, 271. The first plea filed in this case is therefore a good plea. The persons claiming to be the heirs of Parker Campbell are, it seems, citizens of the State of Virginia. The proof of heirship might be made in open court, or by the deposition of witnesses taken upon notice, or before the clerk upon a reference to him for that purpose. The latter mode is the most convenient to the court and the parties, and has been adopted in practice. The supposed heirs may join issue on the first of the pleas filed in this case, and have a reference to the master to take proof and report the facts.

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The other plea is clearly void, because it does not state facts from which the court can see that the will alleged to have been made and probated in the State of Virginia undertook to dispose of the right of action in question: *Williams v. Saunders*, 5 Cold., 60. Whether a will of personalty executed in another State and there probated can be noticed by the courts of this State until made effectual by our laws seems to admit of doubt: *Carr v. Lowe*, 7 Heis., 84. But there can be no doubt that a foreign executor can neither sue nor be sued as such in this State: *Allsup v. Allsup*, 10 Yer., 283; *Young v. O'Neal* 3 Sneed, 55.

GEORGE W. SLATTERY v. ALBERT LEA.

PLEADINGS AND PRACTICE. *Ejectment. Privity of estate. Charge of court.*

A plaintiff in ejectment cannot recover upon a demise in the name of third persons between whom and himself there is no privity of title or estate, and if in fact there is no proof to that effect, it is not error for the court to charge the jury that the plaintiff is not claiming title through those persons, or at least has introduced no proof tending to show that there is any privity of estate or title between him and them.

FROM LAUDERDALE.

Appeal in error from the Circuit Court of Lauderdale county. T. J. FLIPPIN, J.

Slattery v. Lea.

W. WILKERSON and JOE C. MARLEY for Slattery.

W. E. LYNN for Lea.

COOPER, J., delivered the opinion of the court.

Action of ejectment, in which judgment was rendered in favor of the defendant, and plaintiff appealed in error.

The plaintiff purchased the land in 1866 at a judicial sale made in a suit for partition among the children and heirs of Granville D. Searcy, deceased. Granville D. Searcy was one of six children of Robert Searcy, who was one of the seventeen children of Reuben Searcy, who died in 1815. The land, about 76 acres, was granted by the State June 20, 1838, to the heirs of Reuben Searcy, meaning, as the proof clearly shows, the heirs of the Reuben Searcy who died in 1815. The grant was based upon a certificate or warrant for a deficiency in land in Wilson county held under an old North Carolina grant, the property of the ancestor, Reuben Searcy. The warrant for the deficiency had been obtained by Robert Searcy, and there is proof tending to show that the other children left to him the fruit of his discovery. The strict legal title of the plaintiff, upon the muniments introduced by him, would only be $\frac{1}{6}$ of $\frac{1}{17}$ or $\frac{1}{102}$ part of 76 acres. If he had title to the whole land, the contest was one of boundary.

The original declaration contained only one count in the plaintiff's own name. He afterwards filed another count in his own name, and the names of R. T. Searoy and others, who are shown to be the heirs of Reuben Searcy, Jr., who died in 1815, and was

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one of the seventeen children of Reuben Searcy, the elder. There is not a particle of proof in the record showing any connection between the title of the plaintiff and the title of the heirs of Reuben Searcy, Jr. His Honor, the trial judge, after explaining to the jury that if, owing to any irregularity in the partition proceedings, the plaintiff had not acquired the legal title of the heirs of Granville D. Searcy, he might have the benefit of their legal title by amended declaration, said: "But he cannot bring into his suit, by amending his declaration, a third party between whom and himself there is no privity of title or estate whatever, and under and through whom he does not, and cannot claim title. For if this third party could recover on his title, it could in no way benefit the original plaintiff. So in this case, by amending the declaration the title to the land is claimed to be in the heirs of Reuben Searcy, to whose heirs the land in controversy was granted by the State of Tennessee, which grant has been read in evidence. But the proof introduced by the plaintiff shows that the Reuben Searcy, whose heirs are set out in the declaration, was a son of the Reuben Searcy to whom the land was granted, and the plaintiff, Slattery, is not claiming title through the Reuben Searcy heirs mentioned in the declaration, or at least he has introduced no proof tending to show that there is any privity of estate or title whatever between himself and them. So that if they were entitled to recover the land in controversy, or any part of it, it could not possibly enure to his benefit so far as this record shows. They are

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not parties before the court in the sense of bringing a suit to recover the land for themselves. They are brought in on the motion of the original plaintiff on the idea that he had the right to use their names, so that in the event they could recover and he could not, nevertheless the recovery would enure to his benefit. This view of the case narrows the issue down between the plaintiff Slattery on the one side and the defendant on the other."

The only error assigned for reversal is in this part of the charge as infringing upon the province of the jury. But in the absence of any proof whatever to show a connection between the title of the original plaintiff and these new parties, the charge could not possibly prejudice the plaintiff. It contains, moreover, a correct exposition of the law in relation to the introduction of new demises in the declaration in an action of ejectment. And if the charge had assumed as conceded the fact that the plaintiff was not claiming title through the heirs of Reuben Searcy mentioned in the declaration, it was the duty of the plaintiff to object to the assumption at once. For otherwise his conduct would operate as a fraud upon the court. A judge may well narrow the matters submitted to the jury in accordance with the express or fairly implied concessions of the parties, so as to lighten the labor of the jury, and hasten the dispatch of business: *Hayes v. Cheatham*, 6 Lea, 1; *McColgan v. Langford*, 6 Lea, 108; *Manlove v. Searight*, 8 Lea 94.

Affirm the judgment.

State v. Lowenhaught.

THE STATE v. LOWENHAUGHT.

PRIVILEGES. *Retail and wholesale liquor dealer.* A retail dealer is one who sells by small quantities to suit customers articles which are bought in larger quantities generally. A wholesale dealer is one who sells in gross and not by the small quantity to consumers.

FROM TIPTON.

Appeal in error from the Circuit Court of Tipton county. T. J. FLIPPIN, J.

ATTORNEY-GENERAL LEA for the State.

J. H. LAUDERDALE for Lowenhaught.

FREEMAN, J., delivered the opinion of the court.

The defendant was presented for selling liquor by the quart, and in larger quantites, not to be drank on the premises, not having any special license so to do, in violation as is avowed, of the act of the Legislature, requiring wholesale liquor dealers to take out a license. The presentment was quashed by the circuit judge, and the State appealed.

The only question is, whether the act as charged, is the subject of a criminal prosecution.

By the general revenue act of 1881, page 256, sec. 40, it is declared to be a privilege, among other things, to follow the occupation of a "liquor dealer, whether the liquors be spirituous, vinous or malt." This act

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passed April 6, 1881. By an act passed next day, entitled an act "to provide revenue for the State of Tennessee and counties thereof," sec. 4, page 201, it is provided that "wholesale liquor dealers" shall pay a privilege tax of \$150 and taxed 'as other merchants. Retail liquor dealers are to be taxed as other merchants, and in addition shall pay a privilege tax as therein prescribed; to-wit, in towns of one thousand inhabitants or less \$150; of one thousand and less than five thousand \$150, and over five thousand \$200 per annum.

The presentment in this case is very indefinite and might well be held to fail to show the facts sufficiently, as to raise the question intended by the draftsman, and urged for decision in argument.

It is not averred that the defendant is a licensed tippler nor a wholesale merchant. From the argument we infer he is a tippler, who sold by the quart in this instance, and by larger quantities than a quart, not drank on the premises or intended to be, and the gist of the offense is contained in the charge, that he did not have a license as a wholesale dealer.

The real questions are, whether a sale as averred, charges a violation of the law forbidding wholesale dealers to sell, without license for such privilege; and second, whether in such a case, the party may be criminally proceeded against.

We have no definition in terms in any of our statutes of a wholesale dealer in liquor, nor of a retail dealer. It is clear that the occupation and business of a wholesale dealer by 46 section of act of 1882, is

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a privilege and is forbidden to be followed without a license; but does this presentment charge the party guilty of doing this? We cannot so understand it. Mr. Bouvier (Law Dict., vol. 2, page 473), defines retail "to sell by small parcels, and not in gross." Retailer of merchandise as "one who deals in merchandise in smaller quantities than he buys—generally with a view to profit."

These definitions are not clear nor full, and do not add much to a distinct conception of the things attempted to be defined.

We take it, what is meant by retailing is selling by small quantities, to suit customers, articles which are bought in larger amounts generally. Now one who sells in this way, or whose business is so to sell is a retail dealer, one who sells by the nature of his business in gross, and not by the small quantity or parcel to consumers, is a wholesale dealer.

While these definitions may not include all the elements in detail of either character of dealer, they go far enough for the decision of this case.

It is not averred that the defendant is a wholesale dealer, or that he sells or did sell to this party by the wholesale, to be by him retailed, or as a retail dealer, nor in fact is there any fact averred from which the party's character as wholesale dealer can be made out except that he "sold by the quart and in larger quantities, not drank or intended to be drank on the premises. It may have been a gallon sold in a jug on the order of a customer. It would be an abuse of language to hold this would constitute a wholesale

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dealer in liquors, intended to be provided for by the statute.

For these reasons we think the presentment was properly quashed, and affirm the judgment.

R. A. HUNT v. EUGENIA GLENN *et al.*

SALE OF PROPERTY OF PERSONS UNDER DISABILITY. *Witnesses.* Upon application for the sale of property of persons under disability, a witness who testified that he had agreed to purchase at a designated sum, may purchase at the sale of such property and the sale will not be void under sec. 3339 of Code.

FROM GIBSON.

Appeal from the Chancery Court at Trenton. JOHN SOMERS, Ch.

M. M. NEIL for complainant.

J. S. COOPER for defendants.

TURNEY, J., delivered the opinion of the court.

The question in this case arises upon section 3339 of the Code, ch. 3, headed "Of the sale of property of persons under disability. That section is: "No guardian, next friend or witness in such cause shall

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purchase at any sale, or at any time afterwards, until five years from the removal of existing disabilities; and if any such person should make such purchase, the original sale shall become void, and the infant or married woman may bring ejectment for the land, as if no sale had been made."

The facts are, the trustee had contracted to sell the land of his *cestui que trust* to the complainant at the price of \$2,000. Doubting his power under the will to consummate the sale, he resorted to the chancery court and asked a confirmation of his sale. Complainant was introduced as a witness to prove, and did prove, only that he had agreed to purchase at the price, that he was then willing to execute the contract, and his ability to carry it out. The sale was confirmed.

Complainant now seeks to avoid his purchase because he was a witness.

We do not think his testimony is of the kind contemplated by the statute to make the sale void. He does not prove the ages, circumstances and condition of the *cestui que trust*, nor what other (if any) property they owned or were entitled to, nor any cause or reason why the property should be sold, as is required under the statute referred to.

The purpose of the section cited is to protect persons under disability from the artifices of persons who may desire to own their property and may resort to unfair means, even upon the witness stand, to bring it to sale that they may purchase.

In this case the testimony of complainant is a
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simple admission that he agreed to purchase, and was willing, with the approval of the court, to purchase at a price specified, leaving the court to find from other sources whether the facts authorizing a sale under the law existed.

The chancellor so thought, and his decree is affirmed.

11L 18
1pi 450

CHARLES MULLER v. THE STATE.

CRIMINAL LAW. *Sale of liquor on Sunday. Witnesses.* On the trial of an indictment against the owner of a saloon for retailing spirituous liquors on Sunday, the bar keeper of the owner is not compellable to testify, if his answer would expose him to a criminal charge for the same offense.

FROM SHELBY.

Appeal in error from the Criminal Court of Shelby county. L. B. HOBIRIGAN, J.

LUKE E. WRIGHT for Muller.

ATTORNEY-GENERAL LEA for the State.

COOPER, J., delivered the opinion of the court.

Muller was called as a witness on behalf of the State on the trial of an indictment against John Wen-

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dell for selling liquor on Sunday. Muller had not been a witness before the grand jury on the finding of the indictment. Being asked by the Attorney-General if to his knowledge the defendant Wendell had sold spirituous liquors on Sunday within twelve months before indictment found, Muller said that he was, and had been for several years last past the bar-keeper of the said Wendell, and could not testify to the selling of spirituous liquors by him on Sunday without criminating himself; and for that reason alone he declined to answer. The Attorney-General then stated in open court that he would not prefer an indictment against Muller upon said charge. The court thereupon ruled that said Muller must answer the question, and, upon his still declining to do so for the reason given, the court adjudged him in contempt, and fined him fifty dollars. From this judgment, Muller appealed in error.

A witness is not compellable to testify where it reasonably appears that his answer will tend to expose him to a criminal charge, and the statement of the Attorney-General was not such a protection from the charge as the witness was entitled to: *Page v. State*, MS. opinion. The owner of a drinking saloon may be held liable for a violation of the Sunday law by a sale of liquor by his agent or bar-keeper with his permission or tacit consent: *Neideiser v. State*, 6 Baxt., 499. And the employee would be guilty personally if he made the sale, or otherwise actively aided in the violation of the law: *State v. Caswell*, 2 Hum. 399. The owner and servant might also be

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jointly indicted for the same act: *Id.* Under these circumstances, it does reasonably appear that the answer of the witness would tend to expose him to a criminal charge, and he could not therefore be compelled to testify on the trial of an indictment against his employer.

The judgment of the trial court must consequently be reversed.

GIBSON COUNTY, in error, v. A. W. RAINS.

1. COUNTY WARRANTS. *Pleadings and practice. Supreme Court practice.*
Whether county warrants are instruments of such a character that suits may be predicated upon them is not determined in this case. No such objection was raised in the court below, and such objection cannot be made now in the Supreme Court. The same is true as to the objection that county warrants are not negotiable, and suit cannot be maintained in name of assignee.
2. SAME. *Suits against county.* A county may be sued upon a demand although the plaintiff may not have followed and exhausted all the modes prescribed by sec. 427 *et sequente* of the Code for obtaining money from the county treasury.
3. SAME. *Interest.* These warrants are not negotiable and do not bear interest, but the jury may allow interest by way of damages, if they see proper.

FROM GIBSON.

Appeal from the Circuit Court of Gibson county.
J. T. CARTEL, J.

Gibson County v. Rains.

HILL & WILLIAMSON and McDEARMAN & TYREE
for county.

JOHN S. COOPER for Rains.

COOKE, Sp. J., delivered the opinion of the Court.

Rains sued Gibson county, before a justice of the peace, upon a number of county warrants, some of which had been issued to him directly by the chairman of the county court, and some issued to other persons and either assigned to him or transferred by delivery. The following are specimens of these warrants:

\$44.20.

To the Trustee of the county of Gibson:

Pay to A. W. Rains \$44.20 on account of spring jury tickets, appropriation, etc., from 1st of March, 1876.

Allowed April term, 1876.

A. W. RAINS, *Chairman*.

No. 1339, Book A, page 53.

\$25.00.

To the Trustee of the county of Gibson:

Pay to V. M. Taylor, Trustee, etc., twenty-five dollars on account of amount allowed Mrs. Clay and family as paupers.

Allowed April term, 1875.

A. W. RAINS, *Chairman*.

No. 329, Book A, page 13.

Pay to A. W. Rains.

V. L. M. TAYLOR.

By J. T. ALFORD.

All of said warrants were issued before February, 1877. Suit was instituted on the 18th of February, 1878. Judgment was rendered in favor of the plaintiff, and the defendant appealed to the circuit court, where the cause was tried by the court without the intervention of a jury, when judgment was rendered

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in favor of the plaintiff below, and the county has appealed to this court.

Various errors are assigned here for reversal.

It is first alleged that the county cannot be sued upon these demands, at least until the plaintiff has followed and exhausted all the modes prescribed by section 427, and following sections, of the Code for obtaining money from the county treasury.

We do not think there is anything in this position. The provisions of the Code above referred to were evidently intended to protect the county treasury from peculations, and also to facilitate the collection of claims against the county without suits. But by section 403 of the Code "suits may be maintained against a county for any just claim as against other corporations, and process shall be served upon the presiding officer of the county." And by section 534, "where judgment is obtained against a county, the county court shall impose a tax to pay it at the next regular imposition of taxes after the judgment; and the taxes, when levied and collected, shall be immediately applied to the payment of the judgment." The case of *Camp v. Knox County*, 3 Lea, 199, was a suit upon a county warrant in substance precisely similar to these now under consideration, and the only question made in that case was as to whether or not it bore interest as a matter of law; and while this question was determined adversely to the plaintiff in that case, the suit was maintained and judgment rendered in favor of the plaintiff for the amount specified in the warrant with-

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out interest. So in the case of *Davidson County v. Ohwill*, 4 Lea, 28, and the causes heard with it. These were agreed cases, and the question was whether the county could stipulate by express contract to pay interest upon these warrants after a given time, and it was held that it could, and judgment was rendered against the county. In neither of these cases was there any question made as to the right of the holder of these demands against the county to sue upon them.

It is next objected that these warrants are not instruments of such a character that suits can be predicated upon them. In the case of *Bradley County v. Surgoine & Tibbs*, 9 Baxt., 407, it seems to have been assumed that they were, but without any discussion of the question or citation of authorities. Yet in a later case (*Camp v. Knox County*, 3 Lea, 199,) this was seriously questioned. How this is, it is not necessary here to inquire or determine, as in this case no objection was taken in the case below, in any manner, either to the form of the action or the introduction of these warrants in support of it. Under the liberal rules established in favor of proceedings before justices of the peace, we hold that it is too late now to make the objection, as, if it had been done upon the trial below, the proper amendment might have been made under our statutes of jeofail.

The next objection urged is, that as these warrants are not negotiable, the plaintiff below cannot maintain the suit in his own name upon such of

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them as were assigned to him or transferred by delivery.

The same answer applies to this as well as to the last objection. This was mere matter of form, and no exception having been taken in the court below, it was cured by the finding of the court acting in the place of a jury, and cannot now be assigned as error: 1 Heis., 313.

The circuit court allowed interest upon these demands from the time the warrants were presented to the trustee and payment refused because there was no money in the treasury, and it is very earnestly insisted that this was error.

It is very true that these warrants, although drawn in the form of negotiable instruments, are not such by law, and do not bear interest, either from the date of their issuance, or even after demand and refusal of payment, and are simply *prima facie* evidence, in the hands of the holder, of a non-interest-bearing demand against the county. Yet such demand, being left as at common law, and being due and unpaid, a jury, or the court acting as or instead of a jury, had an equitable power to give interest by way of damages, if he thought justice so demanded. And having exercised that power, we see no cause to interfere with it.

It is also urged that the court erred in refusing to allow a continuance of the cause on the application of the defendant below, in support of which a statement taken as upon affidavit was submitted, to the effect that one Beggs, the then chairman of the

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county court, had been attending to the case; that he was a material witness, and setting forth facts which the counsel deemed material for the defense, and which he expected to prove by said witness, and that letters had been received from him stating that his family and himself were too sick for him to leave them. It is not necessary to inquire whether the facts which it was stated were expected to be proved by said witness were material or not, as it is not shown that he had been summoned as a witness in the cause, or any reason why he was not summoned, or that he or his family were actually sick, or that there was no other witness known to the defense, either present or whose attendance could be procured, by whom the same facts could be proved. It was also further stated that one of the leading counsel for the defendant was sick and unable to attend the court, but as the court no doubt saw that the defense had other leading and competent counsel present, and as the cause had then been in court more than a year, his honor declined to grant the application. This was a discretion belonging to the circuit judge, to be exercised by him in view of all the surrounding circumstances, and we think his action was correct; or at least we see no grounds to justify us in reversing it. The record contains no reversible error, and the judgment of the circuit court will be affirmed.

The court below, before granting the appeal prayed to this court, required the defendant to give bond in double the amount of the judgment, conditioned

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to abide by and perform the judgment of this court. This his Honor had no right to require; upon this sort of a demand, a cost bond was all that was authorized by law. It has been frequently held by this court that where such a bond has been exacted by the court, without authority of law, it is only obligatory to the extent of the requirements of the law in such case. Judgment will therefore only be rendered against the sureties on the appeal bond jointly with the principal for the costs of this court, and interest since the appeal, and against the principal alone for the amount of the judgment of the circuit court.

Case No. 220, between the same parties, involves the same questions, and will also be in like manner affirmed.

11L 26
16L 592

 JOHN G. COMBS *et al.* v. JOHN W. STUMPLE *et al.*

CONSTITUTIONAL LAW. *Removal of county seats.* Under the Constitution of 1870, art. 10, sec. 4, which forbids the seat of justice of any county to be removed without the concurrence of two-thirds of the qualified voters of the county, the removal from the old site to a new place cannot be made except by the required vote, and therefore the act of 1881, ch. 98, which authorizes the removal by a majority of the votes, is unconstitutional.

 FROM M'NAIRY.

Appeal from the Chancery Court at Purdy. G. W. NIXON, Ch.

Combs v. Stumple.

McCORRY & BOND for complainants.

JOHN L. T. SNEED, J. W. PACE and A. W. STOVALL for defendants.

COOPER, J., delivered the opinion of the court.

The Constitution of 1870 contains the following provisions: "When an old county is reduced for the purpose of forming a new one, the seat of justice in said old county shall not be removed without the concurrence of two-thirds of both branches of the Legislature, nor shall the seat of justice of any county be removed without the concurrence of two-thirds of the qualified voters of the county": Const., art 10, sec. 4. The Legislature undertook by the act of 1873, ch. 103, to provide for the removal of county seats, and this act was amended by the act of 1881, ch. 98. The latter act provides that the county court of any county may, a majority of the justices of the county concurring, order an election to be held by the sheriff thereof, to ascertain if the people desire the county seat removed from its present location. After prescribing the mode in which the election shall be ordered and held, the act by sec. 7 provides: "That if two-thirds of the qualified voters of the county have concurred in the removal of the county seat from its location, then the county court shall order an election to be held by the sheriff to ascertain the place the county seat shall be located." At the election to be held for this purpose "each voter shall put on his ballot the name of the place he desires the county seat located at, and the place receiving the majority of votes shall be the

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location of the county seat." It further enacted "That the sheriff shall make his returns to the judge or chairman of the county court, and the county court shall proceed to make all necessary provisions for the removal of the county seat, and the erection of the proper and necessary buildings for the courts."

Under this act, the county court of McNairy county, a majority of the justices of the county concurring, on July 4, 1881, ordered an election to be held "for the purpose of ascertaining if the people or the qualified voters of said county desire the county seat removed from its present location." An election was held, and the sheriff made a report of the result to the county court at its October term, 1881. The justices found the number of votes cast for and the number against removal, and declared that more than two-thirds of the qualified voters of said county on that day, and that two-thirds of the legally qualified voters of the county had concurred in the removal of the county seat. The court therefore declared that the seat of justice of said county be removed from the present site to a new site to be afterwards located. And the court ordered an election to be held on November 10, 1881, for the purpose of selecting the new site. This bill was filed November 5, 1881, against the justices of the county to enjoin any further proceedings under the order. The complainants are citizens and tax payers of the county of McNairy. The chancellor, on the final hearing, made the injunction granted upon the filing of the bill perpetual, and the defendants appealed.

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The Constitution, by the provisions above cited and other provisions touching the formation of new counties and the change of county lines, has shown a sedulous regard for the rights of property acquired by the location of a county seat, and carefully guarded against a disturbance of those rights unless the public interest imperatively demanded a change. The county seat cannot be removed in any case without the concurrence of two-thirds of the qualified voters of the county. And it is well settled in this State that the private citizens and tax payers may invoke the aid of the courts to prevent an infraction of these constitutional provisions.

“Nor shall the seat of justice of any county,” says the original law, “be removed without the concurrence of two-thirds of the qualified voters of the county.” The act of 1881 provides for an election “to ascertain if the people desire the county seat removed from its present location.” And at the election for this purpose a concurrence of two-thirds of the qualified voters is required. The act then requires another election to be held to determine the place where the county seat is to be located, at which election a majority of the votes shall prevail. In other words, the popular “desire” for a change must be shown by a two-thirds vote, while the actual removal may be determined by a bare majority. But the Constitution says nothing about ascertaining the popular “desire,” by an independent vote, to a change in the abstract, and forbids the county seat to be “removed” without the concurrence of two-thirds of the qualified voters.

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And it is difficult to conceive how the seat of justice of a county can be "removed" from one place until it has been actually transferred by law to another place. The Constitution manifestly contemplates that the old seat of justice shall continue as originally located until there is an actual removal to another place by the required vote. The desire and the removal, the will and the deed must concur in one and the same election. If it were otherwise, there might be repeated elections before a majority vote could be obtained for any one locality, the people of the county excited and corrupted by the struggles of private interests, and the property owners of the county town kept in a state of protracted uncertainty. A change of the seat of justice ought clearly not to be made unless the public interests unmistakably point to the new locality. The act of the Legislature which allows the removal by a bare majority is clearly unconstitutional.

The chancellor's decree will be affirmed with costs.

Rutherford v. The State.

A. L. RUTHERFORD v. THE STATE.

CRIMINAL LAW. *Proof of name of deceased.* The failure of the witnesses, on a trial for the murder of a particular individual, to give the full name of that person as set out in the bill of indictment, is not material after verdict, if the name or description as given by the witness corresponds as far as it goes with the name mentioned in the indictment, it sufficiently appearing that there was no contest over the name or identity of the person.

FROM TIPTON.

Appeal in error from the Circuit Court of Tipton county. T. J. FLIPPIN, J.

SIMONTON, YOUNG & BLACKWELL and J. H. LAUDERDALE for Rutherford.

ATTORNEY-GENERAL LEA for the State.

COOPER, J., delivered the opinion of the court.

The prisoner was tried upon an indictment for murder in the first degree, and was convicted of the crime of involuntary manslaughter. . He has appealed in error.

The evidence in the bill of exceptions would have justified a conviction for a higher grade of homicide. Upon this ground, the prisoner's counsel bases an argument for reversal. But a criminal person may be holden for any crime, of whatever nature, which can be legally carved out of the act. If the evidence

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show him to be guilty of a higher offense, or of a lower, or of one differing in nature, whether under a statute or at common law, he cannot be heard to complain; the question being whether it shows him to be guilty of the one charged: 1 Bish. Crim. Law, sec. 791; *Wright v. State*, 8 Lea, 568. Manslaughter is merely a lower grade of homicide: Bish. Crim. Law, sec. 780. And, by statute, on an indictment for a public offense admitting of degrees, the defendant may be convicted of any degree lower than that charged in form: Code, secs. 5122, 5222. The defendant may, therefore, be convicted of manslaughter, though murder be shown: *Commonwealth v. McPike*, 3 Cush. 181; *Barnett v. People*, 54 Ill. 325. And found guilty of manslaughter under an indictment for murder.

Another error assigned is in the exclusion by the trial judge of the testimony of a particular witness, who stated that he met the person killed shortly before the difficulty with the defendant, and that he was then in a high state of excitement in regard to a fine imposed upon him that morning in the police court. But neither the interview, the excitement of deceased, or the conversation of the witness was shown to have any connection with the defendant, or his subsequent fatal rencounter with the deceased. The testimony was properly rejected.

It is next urged that the indictment against the defendant is for killing John Bledsoe, whereas the evidence shows that the person killed was named John. The witnesses in the bill of exceptions are made to speak of the person killed as either John or the de-

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ceased. Both the prisoner and the deceased were negroes in menial service, as to which class of the community it is the custom to speak of or to individuals by using the christian name alone. The prisoner himself is named Abraham Lincoln Rutherford, but is known and almost uniformly mentioned in the record as Link. There was no contest over the identity of the person killed, the witnesses whenever they mentioned his name did so by calling him John. That was the christian name of the murdered man as mentioned in the indictment.

In the first case in our reports on this point, the prisoner was indicted for the murder of William Trammel. On the trial, the witness spoke of the murdered man as Trammel or the deceased, without mentioning his christian name. The court said of the objection made on account of the variance: "We think this objection entirely too technical, and insufficient in reason or law, as a ground upon which to disturb the verdict. * * * It does not appear that any question was made as to the given name of the deceased. * * The witnesses all referred to the deceased as Trammel, or the man that was slain, and for the murder of whom the defendant was on trial. The jury certainly had proof enough to find that the man upon whom the murder was committed was named William": *Joyce v. State*, 2 Swan, 667. In a subsequent case, the prisoner seems to have been indicted for murder "of his wife, Agnes Stuart." None of the witnesses spoke of the person killed as Agnes Stuart, but as Mrs. Stuart, or the prisoner's wife. The omission or vari-

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ance was held to be of no consequence after verdict, referring to the case above: *Stuart v. State*, 1 Baxt. 178. In a still later case, the indictment charged the killing of D. Oliver. The proof showed that the person killed was named DeWitt Oliver, one witness so naming him, while all the other witnesses spoke of him as Oliver. "No question," says the opinion, "was raised as to his name, so that if his given name had been entirely omitted in the evidence, after verdict no question could be raised upon it. His identity was well established as the person slain by the defendant": *Scott v. State*, 7 Lea, 232. These cases conclusively determine that an omission to set out the full name of the party killed in the bill of exceptions, or the failure of the witnesses to give the full name, is not material after verdict, if the name or description as given by the witnesses corresponds as far as it goes with the name mentioned in the indictment, it sufficiently appearing that there was no contest over the name or identity of the party. The principle covers this case: *Timms v. State*, 4 Cold., 138, was treated by the judge who delivered the opinion as a case of positive variance, although it may be doubted whether the facts justified the conclusion.

There is no error, and the judgment must be affirmed.

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CHARLES MOORE v. THE STATE.

CORPORATION, MUNICIPAL. *Taxing districts. Power to impound stock.*
Under the third section of the act of the Legislature creating Memphis a taxing district, power is given said district by ordinance to provide for impounding stock running upon the streets.

FROM SHELBY.

Appeal in error from the Criminal Court of Shelby county. L. B. HERRIGAN, J.

C. W. HEISKELL for Moore.

ATTORNEY-GENERAL LEA for the State.

DEADERICK, C. J., delivered the opinion of the court.

Moore was convicted in the criminal court of Shelby county by the judge, a jury being waived, of assault and battery, and has appealed to this court.

The defendant was authorized by an ordinance of the taxing district to take up and put in a pound stock, including swine, running at large upon the streets of the city of Memphis. In the execution of this duty the prosecutor interfered with defendant, and no more force was used by him than was necessary to overcome such interference. The judge held the ordinance invalid, as not being authorized by the act creating the taxing district, and conferred no authority to take up or impound stock, and upon this

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ground he adjudged defendant guilty of an assault and battery.

The third section of the act under which Memphis was created a taxing district provides that the local government shall have power to establish work-houses, etc., and to declare what acts shall be misdemeanors, and, when committed within the taxing district to punish the offenders by fine and forfeiture, and by imprisonment and labor, within and without the work-house, in default of the payment of the fines imposed as punishment.

Under this act the taxing district made it a misdemeanor in the owner to permit his stock to run at large in the streets, etc., of the city, and the chief of police was required to have all such stock taken up and put in the pound, allowing the owner three days within which to reclaim it, and if not reclaimed within that time, then to be advertised four days, and sold at public sale, with provisions for disposition of the proceeds of sale by paying the same over to the register, less costs incident to sale, etc.

We have been furnished no brief on the part of the State.

The ground upon which we suppose the ordinance was held void by his honor, is, that the act directs the mode in which persons guilty of misdemeanors shall be punished, namely, fine and imprisonment. But the language of the act is, by "fines and forfeitures, and by imprisonment," in default of payment of fines imposed," and it does not prescribe the conditions upon which the forfeitures may be en-

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forced. It does, however, expressly confer the power to punish by forfeitures, as well as by fines and imprisonment.

The ordinance declares the permitting stock to run at large in the streets, etc., a misdemeanor, and proceeds to provide for impounding and disposing of it.

The act also confers on the taxing district power to define, prevent and remove nuisances. Section 3. Under the power to make ordinances for the removal of nuisances, and for the good government of the town, an ordinance was passed to impound hogs running at large, and advertise and sell after three days and pay to owner proceeds after deducting charges. It was held by the Supreme Court of North Carolina that the ordinance was reasonable, and the corporation, under the power referred to, had authority to pass it. In a subsequent case in the same court a similar ordinance was sustained. See 1 Dil. Municipal Corporations, sec. 284.

In 7 Lea, 441, it is held that under an express power to impose forfeitures, a municipal corporation may, by ordinance, impound the stock of a non-resident, running at large in its streets, etc.

In that case the power conferred was, "full power and authority to enact and pass such laws and ordinances as are necessary to preserve the health of the town, to prevent and remove nuisances, * * to impose and appropriate fines, penalties and forfeitures for the breach of the by-laws and ordinances."

We are of opinion that the ordinance in question was valid, and authorized by the third section of the

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taxing district act, and that the opinion of his Honor, the judge of the criminal court, was erroneous. And inasmuch as the guilt of the defendant depended upon the invalidity of said ordinance, the judgment will be reversed, and defendant will be discharged.

ANNA M. ELLIOTT *v.* B. W. WILLIAMSON Adm'r.

TAXES, MUNICIPAL. *Statute of limitations. Presumption of payment.* The general statute of limitations is no defense to the enforcement of its taxes by a municipal corporation, nor will the lapse of time or laches of the city officials prevent the recovery of a tax properly assessed if clearly shown to be unpaid, but the lapse of time, in connection with other circumstances, may raise a presumption of fact that the tax has been paid, which will establish the defense of payment unless rebutted.

FROM SHELBY.

Appeal from the Chancery Court at Memphis. W.
W. McDOWELL, Ch.

MALONE & WATSON for complainant.

HUMES & POSTON for defendants.

COOPER, J., delivered the opinion of the court.

Bill filed upon a covenant of general warranty of title to a lot of ground in the city of Memphis, to

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recover money paid in satisfaction of taxes claimed to be due the city for the year 1857, and to be a lien on the land covered by the warranty. The bill was dismissed and complainant appealed.

The lot in question was sold and conveyed to C. Kortrecht on June 5, 1857, by the Planters Bank, that bank having bought it several years before from the Farmers and Merchants Bank of Memphis. On May 8, 1861, Kortrecht sold and conveyed the lot to Hiram Tillman, defendant's intestate, and he, on October 26, 1868, sold and conveyed the lot to the complainant with a covenant of general warranty. All the taxes on this lot, State, county and city, both before and after the year 1857, were paid; except the United States district tax of 1864, for which the lot was sold and afterwards redeemed. Kortrecht was a man of wealth up to and including the year 1873, a good business man, and always specially careful in looking after his taxes. He died in 1878 insolvent, and his wife died the next year. Since the commencement of this litigation, the papers of Kortrecht have been examined, and no receipts for taxes paid on his property can be found prior to the year 1866. Tillman paid the taxes on the lot promptly, lived in the city from 1868 until his death in 1876, was solvent, and left a solvent estate. No claim for the city tax of 1857 seems to have been made on any one, and the existence of the tax was unknown to the complainant until a few days before she paid it. The tax was assessed by the municipal authorities for the fiscal year beginning July 1, 1857, and ending June 30, 1858, The tax not having

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been paid, the lot on which it was assessed was sold by the tax collector in 1858, and bought in by the city. The complainant sold the lot agreeing to pay the taxes, and her agent learned through a private abstract office, and upon investigation that according to the original tax books of the city the tax for the fiscal year of 1857 was unpaid. Under his advice, the complainant paid the tax on January 10, 1882, without giving the personal representatives of Tillman or Kortrecht any notice. The back-tax collector was insisting upon the payment of all taxes which appeared from the city tax books to be unpaid, had given notice through the city papers to delinquent tax payers to come forward and pay, and was filing bills against delinquents as fast as they could be prepared.

During the civil war Memphis was occupied by the armies of both sides, and all the records of the courts were carried South when the Federal troops entered the city in 1862. The result was loss of papers and confusion in the public records. The State and county have not, therefore, attempted since the close of the war to collect any State or county taxes assessed before the year 1865. The corporation of the city of Memphis, however, assessed and collected taxes during the war, and the city and its receiver collected back-taxes to the year 1856, and earlier.

From these facts it may be conceded, and the case has been argued upon the assumption, that the payment of the tax in controversy by the complainant was to avoid a threatened suit therefor by the city receiver, and that the successful prosecution of such a

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suit would have been *pro tanto* an eviction within the covenant of warranty of the defendant's intestate. But as the payment was made without any previous notice to the defendant, the burden is upon the complainant to show that the tax was a valid, subsisting lien upon the land at the time of its payment. For the right of recovery is dependent upon the fact. The defenses relied on are the statute of limitations, and payment. The defense of payment is sought to be made out, not by direct proof, but by lapse of time and other circumstances.

By a well known rule of the common law time does not run against the sovereign or government. And therefore it has been almost uniformly held by the courts that the ordinary statutes of limitation, which only bear the remedy, do not bind the State: *Singleton v. Ake*, 3 Hum., 626. The rule is founded on the principle of public policy that the property and rights vested in the government for the benefit of the whole community should not be dependent upon the negligence or bad faith of the agents or officers to whom the conduct of public business must necessarily be entrusted: *Swan v. Mayor and Aldermen of Knoxville*, 11 Hum., 130. Lapse of time alone cannot, therefore, impair a public right or extinguish a public debt by raising a conclusive presumption of grant or payment, when it is made clearly to appear that no grant or payment was ever in fact made: *People v. Supervisors of Columbia County*, 10 Wend., 363; *United States v. Williams*, 4 McLean, 567. For neither lapse of time nor the laches of public officials can prevent

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the State from asserting a right or obligation, admitted or clearly established.

The authorities are hopelessly in conflict whether this prerogative of government extends to municipal corporations considered as branches of the government. The weight of reason, and perhaps of authority, is to concede the exemption to such corporations as to all matters in which they stand in the place of the State for public purposes: *Sims v. Chattanooga*, 2 Lea, 694. And it has accordingly been held that taxes assessed by a municipal corporation for the public benefit stand like the taxes assessed by the State: *City of Memphis v. Looney*, 9 Baxt., 130; *State ex. rel. v. Butler*, MS. opinion of this court at April term, 1882. The general statute of limitations was, therefore, no bar to the enforcement by the city or its receiver of taxes in controversy, nor would the lapse of time or laches of the city officials prevent a recovery of the tax if clearly shown to be properly assessed, unpaid, and a valid lien on the property on which it was levied.

But these principles are entirely consistent with the rule, equally well established, that although lapse of time does not, of itself, furnish a conclusive legal bar to the demand of the sovereign or State, yet, if the demand might have been paid, or the adverse claim might have had a legal commencement, such payment or commencement may be presumed after many years of uninterrupted, adverse possession or enjoyment. The presumption in such case, subject to rebuttal, is one of fact to be deduced from the entire evidence and circumstances according to the common and received

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tests of truth. Presumption of fact, says Mr. Greenleaf, "differs from presumptions of law in this essential respect, that while those are reduced to fixed rules, and constitute a branch of the particular system of jurisprudence to which they belong, these merely natural presumptions are derived wholly or directly from the circumstances of the particular case, by means of the common experience of mankind, without the aid or control of any rules of law whatever": 1 Gr. Ev., secs. 44 and 45. Accordingly royal grants in England have been found after an indefinitely long entertained, peaceable enjoyment, accompanied by the usual acts of ownership: *Rex v. Brown*, cited Cowp., 110; *Mayor, etc., v. Horner*, Cowp., 102. "For," to borrow the language of Coke's reports, "*tempus est edax verum*, and records, and letters of patent, and other writings either consume or are lost or embezzled, and God forbid that ancient grants and acts should be drawn in question, although they cannot be shown, which at first were necessary to the perfection of the thing": *Bedle v. Beard*, 12 Rep., 5. This court from an early day has given effect to such presumptions. "Prescription and presumption," says Overton, J., in the leading case on the subject, "must be resorted to for the peace, order and happiness of society": *Gwathrey v. Stump*, 2 Tenn., 308. "Indulgent to the weakness of our nature," says Crabb, J., "as a matter of public policy, to promote the repose of society, and to put down litigation, courts intend the existence of facts when it is unreasonable to expect evidence of them": *Hanes v. Peck*, M. & Y., 228, 237. A grant from the State

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will therefore be presumed from the peaceable enjoyment and uninterrupted possession of twenty or more years. "The rule," says Totten, J., "is not founded merely on policy and convenience; but it is a presumption of fact, reasonably to be inferred from long and undisturbed possession and enjoyment, that the claimant had a legal and valid title at the commencement, which, from lapse of time and accident, he may not be able to adduce. In such case a grant, or other proper evidence of title will be presumed, but this presumption may be repelled by proof of other facts": *Brock v. Burchett*, 2 Swan, 27.

In like manner, at common law every debt evidenced by specialty or judgment was presumed to be paid after the lapse of twenty years: Freeman on Judgments, sec. 464. By early judicial legislation in this State, the period of time required to raise this presumption was reduced to sixteen years: *Blackburn v. Squib*, Peck, 64. The presumption is not conclusive, but merely throws upon the party seeking to enforce his debt after the lapse of the prescribed period of inaction, the burden of proving that the debt is unpaid: *Stanley v. Kinzer*, 7 Lea, 454; *Thompson v. Thompson*, 2 Head, 405. Independent of this arbitrary presumption from the lapse of a fixed period of time, the lapse of an indefinite period, though less than the full term of presumption, is a proper circumstance for the consideration of the jury, and may, in connection with other circumstances, authorize the presumption of payment as a fact: Freeman on Judgments, sec. 465. Eight years with circumstances have been held sufficient

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to go to a jury in one case, and thirteen years in another: *Leiper v. Erwin*, 4 Yer., 97; *Husky v. Maples*, 2 Cold., 25. Men cannot be required to preserve through life the acquitances which prove the payment of debts. No reason occurs why the State or municipal corporations, any more than individuals, should be exempt from the presumption of fact arising from lapse of time, which merely shifts the burden of proof. The State is bound by the acts of its officers like natural persons: *State v. Hamilton*, 11 Hum., 47; *State v. Crutcher*, 2 Swan, 515. And the State and, *a fortiori*, municipal corporations must conform to, and be governed by the rules of evidence and practice of the courts in suits between individuals. Taxes cannot have any higher character or immunity than debts due by judgment. The assessment is in the nature of a judgment, and the warrant for the collection operated like an execution: *Hopkinson v. Springfield*, 12 N. H., 328.

The claim of the city in the case before us may be resolved into the debt evidenced by the tax, and the lien on the land given by the statute. The only evidence introduced in support of the claim is the assessment on the tax books for the year 1857, and that there is nothing in the book to show satisfaction or payment. But it is also shown that the city in 1858 sold the lot in satisfaction of the tax, and bought it in for the amount due. *Prima facie* there ought to have been an entry of satisfaction on the tax book, and the fact, which is conceded, unexplained is an end of the claim for the debt. And no explanation is offered. In this view, conceding the validity of the

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tax sale, the question is whether the lapse of time and other circumstances do not raise a presumption that the land was redeemed and reconveyed. The complainant seems to have proceeded in the preparation of this case on the idea that it was a presumption of law that all tax sales were invalid, a presumption fairly unwarranted by the result of litigation over tax titles. If we treat the sale as void, it is still a fact tending to show that the city at that time was prompt in taking steps to enforce the collection of taxes. It is shown, moreover, that the taxes in this particular lot, both before and after the year 1857, were promptly collected and paid. The collection of subsequent taxes from year to year afterwards is moreover a strong circumstance to show the payment of that tax, the demand of the subsequent taxes not being accompanied by any claim for the particular tax: *Attleborough v. Middleborough*, 10 Pick., 378, cited approvingly in *Shuman v. Clater*, 3 Head, 445. The fact that Kortrecht was specially careful in looking after his taxes, and prompt to pay them, and that he and defendant's intestate were both solvent during the respective periods of the ownership of each, are also strong circumstances in the same direction. When we add to all these facts, the peaceable and continuous possession of the property without any claim of lien by the city for over twenty-three years, and over seventeen years if we exclude the time between the 6th of May, 1861, and 1st of January, 1867, we think there is raised, in the absence of any rebutting testimony, a presumption of fact that the tax has been long since paid. Affirm the decree with costs.

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11L	47
12L	442
15L	327
15L	548

JOHN A. JOHNSON v. THE STATE.

CRIMINAL LAW. *Incompetency of juror.* A juror is not incompetent because he said "from what he found out that he thought if prisoner didn't hang they would penitentiary him for life," it not appearing that the statement made by him was founded upon what purported to be evidence that had been, or would be introduced, on the trial, or that any witness, or anyone who had heard a witness, had conversed with him.

FROM CARROLL.

Appeal in error from the Circuit Court of Carroll county. J. T. CARTHEL, J.

HAWKINS & McCALL and M. D. CARDWELL for Johnson.

J. R. HAWKINS and TOWNS and ATTORNEY-GENERAL LEA for State.

TURNEY, J., delivered the opinion of the court.

The plaintiff in error is convicted of murder in the second degree. The first error is assigned upon this language of the charge: "When the evidence shows an intent to kill by the accused, then no words of reproach or abuse whatever are sufficient provocation to free the party killing from murder in the second degree, if it is done by an unlawful act."

If this language were all of the charge upon the subject it would be error.

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The charge is this: What is the meaning of the term provocation? (followed by the quotation), and proceeding: "The term provocation may be defined in general terms to be such a state of circumstances or such conduct as is calculated to produce such passion or heat of blood as would so obscure or becloud the reason of an ordinary man as to induce him to take human life. And, to be more definite, as a general rule if a party receives a blow and strikes back and kills his adversary, it is only manslaughter. The law usually regards a blow as sufficient provocation to reduce the killing from murder to manslaughter, if the party strike only under the influence of sudden passion excited by the blow and not from malice. But a slight blow will not always extenuate a killing from murder to manslaughter; much depends upon the character of the weapon used and the manner and circumstances under which it is used, for there must be some reasonable proportion between the mode of resentment and the provocation. Hence, as a general rule, if two persons suddenly quarrel and fight, and one kills the other, it is manslaughter if he did so in self-defense, but if there be proof of malice in his mind at the time of the killing it would be murder."

We think, taking this entire paragraph of the charge, which includes the part objected to, the meaning of the court is made distinct and clear, and is consistent with the long and well-established rule in the State.

The evidence of the declaration of James John-

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son in the presence of S. W. Johnson, was only admitted as to S. W. Johnson, and not as to the prisoner, and was subsequently withdrawn by the court, with the instruction that the jury should not regard it for any purpose, and to do so would be perjury.

While it is desirable, and courts and attorneys should strive to have it so, that no illegal evidence should go to juries, still we must not overlook the fact that it is impossible at all times in the progress of a trial to determine questions correctly, and that mistakes will of course occur. When such is the case, all that can be done is, that the court shall make the correction, and clearly and plainly explain to the jury. To require more is to require an impossibility.

The prisoner is in no attitude to make the objection, as the testimony was never admitted as to him.

It is next objected a juror, Potete, had formed and expressed an opinion. One witness says: "Potete said he didn't see how they could ever get out of or clear of it, according to what he had heard." Another says he "heard Potete say he had been summoned as a juror, and he said to me, 'I told Hood I was incompetent.'" Another witness says, "Potete talked to me last January during a former trial; said they were trying the Johnson case; said from what he found out that he thought if Johnson didn't hang they would penitentiary him for life." A former slave of S. W. Johnson's father says: "Potete said he thought Johnson ought to be sent to the penitentiary for life."

The character of Potete is shown to be unexceptionable. He is introduced, denies the several conversations attributed to him, and says he had not, when taken as a juror, formed or expressed any opinion as to the guilt or innocence of the defendant.

If we altogether disregard the rebutting statement of Potete, still we do not think there is enough in the record to render him incompetent as a juror. There is nothing from which we are authorized to infer that any of the statements said to have been made by him were founded upon what purported to be evidence that had been or would be introduced on a trial. No witness in the case is shown to have conversed with him, or in his presence, upon the subject of the accusation, nor does it appear that anyone who heard from the witnesses had conversed with him or in his hearing. So, if we take all that is charged to be true, it came alone from rumor and would not disqualify.

Great weight must be attached to the fact that the judge trying the cause had the witnesses examined before him, saw their manner, had the benefit of their modes of expression, and was better prepared to weigh and value their testimony than we who see it only on paper. Besides, it appears that the witness to the strongest expression is discredited.

While the practice of introducing the accused juror to purge himself of offense is reprobated in some of the older cases, we see no sufficient reason for excluding him. That he is charged may go to his credit, but certainly does not disfranchise him. He

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is no more likely as a general thing to swear falsely than are the partisan friends of a prisoner. By an explanation he may be able to even satisfy impeaching witnesses that they have misunderstood him by honest mistake of his language, and induce them to retract or modify.

The objection that testimony tending to show a conspiracy to kill, after a former jury had acquitted of murder in the first degree, was admitted, is not well taken. While such acquittal is a bar to any further prosecution for that offense, it does not operate to exclude evidence of any and all facts touching the killing. Because the evidence may show a higher grade of offense than the one charged, it does not follow that an offense included in the higher may not be made out by evidence of the higher.

The facts fully warrant the verdict, and the judgment is affirmed.

116	51
121	253

JOHN W. WILSON, Ex'r, v. T. H. BENTON, Collector.

1. TAX ASSESSMENT. *Tax collectors. Pleading and practice. Constitutional law.* The act of 1879, ch. 79, which empowers tax collectors to assess all property which has not been assessed, and to proceed to collect the taxes, expressly provides that the suit for these taxes shall be commenced by warrant before a justice; that the warrant may be for the State, county and municipal taxes jointly or separately, and confers upon the justice jurisdiction in all such cases, no matter what may be the amount. These details are all included in the subject of the caption, which is "An act for the more rigid collection of the revenue."

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2. SAME. *Pleadings and practice.* The statute does not require that the warrant should show or be accompanied with the authority under which the suit is brought for the respective taxes, and a motion to dismiss for want of such authority would not lie. The mode of raising the question would be by a rule on the tax collector to establish his authority, upon a *prima facie* showing of the want of authority by affidavit or otherwise.
3. SAME. *Assessment. How made by tax collector.* The assessment of the omitted property may be made by the tax collector in writing on a sheet of paper, specifying the property and its assessed value, dated and officially signed, accompanied by a statement of the amount of tax thereon due the State, county and municipality.
4. SAME. *Same. May be made. When.* The assessment may be made by the tax collector whose duty it was to collect the taxes for the given year, at any time during his official term.

FROM DYER.

Appeal in error from the Circuit Court of Dyer county. J. T. CARTEL, J.

LATTA & MARSHALL for Wilson.

H. PARKS, JR., for Benton.

COOPER, J., delivered the opinion of the court.

This suit was brought by Benton, as tax collector, against Wilson as executor of Peter E. Wilson, deceased, to recover taxes on property of the said Peter E. Wilson which had not been assessed for the year 1878. On the first of April of that year, being the time appointed by law, the personal property of Peter E. Wilson, who was then living, was assessed at \$14,500. In January, 1879, Peter E. Wilson died, and John W. Wilson qualified as executor of his estate. At the April term, 1879, of the county

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court, John W. Wilson, as executor, filed an inventory of the personal estate of his testator, from which it appeared that Peter E. Wilson owned a large number of notes and judgments, and a large amount of currency not assessed for taxes in 1878. Benton was elected tax collector in August, 1878, and proceeded to assess the omitted property under the act of 1879, ch. 79. The executor did not dispute the assessment, or ask a revaluation of the property before the judge or chairman of the county court. The tax collector thereupon, October 29, 1879, commenced this suit before a justice of the peace, as required by the statute. The assessment and suit were for State, county and municipal taxes for the year 1878. The justice rendered a judgment in favor of the tax collector, and the executor appealed. In the circuit court the case was tried by the judge without a jury, and judgment was again rendered in favor of the tax collector. The executor appealed in error to this court.

The act of 1879 is entitled "An act for the more rigid collection of the revenue." It authorizes all collectors of taxes to assess all property which by mistake of law or facts has not been assessed, and to proceed to collect the taxes. The act allows the owner of the property, if he disputes the assessment, to have a revaluation before the judge or chairman of the county court at any time within one month, whose valuation is made final. If the owner disputes the right of the State, county or municipality to assess the property, the tax collector is required

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to submit the facts to the Comptroller as to the State tax, to the judge or chairman of the county court as to the county tax, and to the mayor of the city or town as to the municipal taxes. If these officers, or any one of them, direct him to proceed, the tax collector is required to obtain from any justice of the peace of the county a warrant for said taxes, returnable before any justice of the county for trial. The statute expressly provides that the warrant may be for the State, county and municipal taxes jointly or separately, and confers upon the justice jurisdiction in all such cases, no matter what may be the amount.

The valuation of the tax collector of the omitted property seems not to have been disputed, and, at any rate, no re-assessment was had by the executor before the judge or chairman of the county court. It is doubtful, therefore, whether the executor could dispute the amount of the assessment upon the trial under the warrant. But if he could, there is evidence in the record sufficient to sustain the finding of the trial judge that the valuation of the omitted property by the tax collector was correct.

The defendant, before the trial, moved the court to dismiss the suit because brought without proper authority, especially as to the municipal corporation, and that the account filed does not disclose how much is due the State, the county and the municipality respectively. The statute does not require that the warrant should show or be accompanied with the authority under which the suit is brought. The

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motion to dismiss for want of authority had nothing therefore to rest on. And the account filed does show the amount of taxes due the State, county and municipality respectively. The motion was properly overruled. And the only mode of questioning the authority of the tax collector to sue for the taxes of any of these parties would have been by a rule made upon him to show his authority, a *prima facie* case of want of authority being first made to appear by affidavit or otherwise.

The statute does not prescribe the mode in which the assessment of omitted property shall be made. In this case it was made by the tax collector in writing, specifying the gross amounts of the currency and notes and judgments belonging to the testator, as shown in the inventory of the executor, and in the division of the assets among the devisees, the tax collector himself being one of the commissioners who made the division. It then deducts the amount of the notes given after April 1, 1878, and adds the amount of certain specified notes not divided. A deduction is also made for the assessment actually made on April 1, 1878, and for the constitutional exemption of \$1,000. The gross valuation of the omitted property is then given, with the amount of tax thereon due to the State, county and municipality. The writing is then dated and signed by the tax collector in his official capacity. This was sufficient.

The assessment having been made by the tax collector, whose duty it was to collect the taxes of

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1878, during his official term, was good, the collector and his sureties being liable therefor: *Otis v. Boyd*, 8 Lea, 679.

The act itself, as we have seen, is entitled "An act for the more rigid collection of the revenue." All of its provisions are directed to the end of securing the assessment and collection of property which has been omitted from the regular assessment. To this end, it prescribes the mode of procedure by which the assessment shall be secured and the collection made, increasing for this specific purpose the jurisdiction of justices of the peace. The details of the act are all included in the subject of the caption. The caption is general, but that is no objection to it, so long as it is not made a cover to legislation incongruous in itself, and which by no fair intendment can be considered as having a necessary or proper connection. The Legislature must determine for itself how broad and comprehensive shall be the object of a statute, and how much particularity shall be employed in the title in defining it: *Cooley Const. Lim.*, 176; *Woodson v. Murdock*, 22 Wall., 351; *State ex rel. v. Whitworth*, 8 Lea, 594.

There is no error in the judgment, and it will be affirmed.

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11L 57
2pi 307

HIRAM MANN v. A. W. ROBERTS.

LIEN. *Execution. Lis pendens. Lost, when.* The lien on land of the levy of a justice's execution, and the *lis pendens* created by the filing of the papers in the circuit court for the condemnation of the land, the order of condemnation, and the *supersedeas* of the *venditioni exponas* thereon by the debtor, will be lost by a failure to prosecute the suit for nearly five years, as against an innocent purchaser for value and without notice, who bought the land from the debtor about three years and six months after the commencement of the period of neglect, and the greater part of whose purchase money had been used to pay off other encumbrances.

FROM HAYWOOD.

Appeal from the Chancery Court at Brownsville.
H. J. LIVINGSTON, Ch.

A. C. ESTES for complainants.

E. J. & J. C. READ and MCCORRY & BOND for defendant.

COOPER, J., delivered the opinion of the court.

Bill to enjoin further proceedings under an order of the circuit court condemning to sale a house and lot in Brownsville under the levy of a justice's execution, upon the ground that the lien had been lost by laches, the complainant being an innocent purchaser from the judgment debtor. The chancellor granted the relief sought, and the defendant appealed.

On February 1, 1873, the defendant, Roberts, re-

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covered a judgment before a justice of the peace against Thomas Bond for \$312.87 and costs, which judgment was stayed by H. T. Grant. On October 31, 1873, an execution issued on the judgment, and was levied upon the lot in controversy as the property of Grant, he then owning and residing upon it. At the October term, 1873, of the circuit court the papers were returned to that court, and the land condemned and ordered to be sold. On February 7, 1874, Grant, by petition filed for the purpose, superseded the execution of the order of sale, upon the ground that Bond, the principal debtor, had property in the county at the time of the levy on petitioner's land, subject to execution and unencumbered, more than sufficient to satisfy the judgment. On March 19, 1874, the motion of Roberts to dismiss the petition and discharge the *supersedeas* was refused, an entry to that effect being made on the minutes of the court in the cause under the style of A. W. Roberts v. Thomas Bond and H. T. Grant. From that time no step was taken in the cause until the October term, 1877, when there is an entry on the minutes that the cause was continued by consent. Up to this time, the cause had been permitted to slumber on the reference docket, which docket, the proof shows, was not called during that period. Afterwards, the memoranda of the circuit judge on the trial docket show either that nothing was done, or continuances by consent, until the February term, 1879. At this term, the minutes show a continuance as on affidavit of the defendant. At the June term, 1879, the cause was tried,| the

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supersedeas discharged, and a *venditioni exponas* ordered to issue upon the order of condemnation of the October term, 1873. At the October term, 1879, it was suggested to the court that Grant was dead, and that he had previously sold and conveyed the land to Hiram Mann, whereupon a *scire facias* was ordered to issue to Mann requiring him to show cause why the suit of A. W. Roberts v. Thomas Bond and H. T. Grant should not be revived against him. This bill was then filed.

On August 7, 1877, Grant, then in the actual occupancy of the land, sold and conveyed it to the complainant for \$2,500 in cash, all of which was paid, and the greater part of which was used in removing encumbrances, in the shape of judgments, mortgages and tax sales, then existing on the land. The proof leaves no doubt that the complainant was an innocent purchaser of the land for its full value, without notice of the defendant's judgment, the levy of the execution thereon, or the subsequent proceedings in the circuit court until served with the *scire facias* on, December 19, 1879. The complainant went into possession of the land at the time of his purchase, and has since continued to occupy it.

An order of condemnation of land upon the levy of a justice's execution is not a judgment, but only a mode of executing the levy: *Ashworth v. Demier*, 1 Baxt., 323; *Overton v. Perkins*, M. & Y., 367. It is not notice to third persons, nor would it be if a judgment, the notice implied from a pending litigation ceasing with its determination: *Worsley v. Earl of*

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Scarborough, 3 Atk., 392; *Dudley v. Witter*, 46 Ala., 664. An order of condemnation gives no lien, but merely continues the lien of the levy, to which the title of the purchaser under the sale would relate.

The only proper use of an execution is to enforce the collection of a debt, and to enforce it, so far as the rights of third persons are concerned, with reasonable diligence. The creditor cannot use it merely as a security for his debt by a levy on property, for the lien thus created is a secret lien, and may operate to the prejudice of innocent third persons if the debtor be left in possession of the property: *Freem. on Ex.*, sec. 206. The lien may be lost by inaction or negligence in not properly and promptly pursuing it: *Etheredge v. Edwards*, 1 Swan, 429; *Snell v. Allen*, 1 Swan, 208. A delay of seventeen months in one case, and of three years in another, has been held sufficient to deprive a creditor of a priority of lien by levy: *Owens v. Patterson*, 6 B. Mon., 489; *Deposit Bank v. Berry*, 2 Bush., 236. And this court has held that the lien of a levy on land of a justice's execution may be lost, as against an intermediate innocent purchaser, by a failure to file the papers in the circuit court for condemnation in a reasonable time: *Anderson v. Talbot*, 1 Heis., 407; *Zook v. Smith*, 6 Baxt., 213. These cases also hold that the proceedings of condemnation become a *lis pendens* from the date of such filing. And the effect of the *lis pendens* in this case is thus raised.

The doctrine of *lis pendens*, by which a *bona fide* purchaser without notice is held bound by the result

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of the suit as if he had notice, is one of public policy and necessary to bring litigation to an end. It is *strictissimi juris*, and, only applies when there has been a compliance in the pending suit with all the requirements which call it into operation. The rule is thus expressed by Lord Bacon: "No decree bindeth any that cometh in *bona fide* by conveyance from the defendant before the bill is exhibited, and is made no party to the bill in order; but when he comes in *pendente lite*, and while the suit is in full prosecution, and without any color of allowance or privity of court, there regularly the decree bindeth. But if there were any intermissions of suit, or the court made acquainted with the conveyance, the court is to give order upon the special matters according to justice." If, therefore, there be "any intermissions of suit," the rule will not apply: Freeman on Judgments, sec. 203. So, the rule applies "while the suit is in full prosecution," not when it is proceeded in with culpable negligence. To have the benefit of it there should be a close and continuous prosecution of the suit from its commencement to its close, taking into consideration the character of the case, the obstacles thrown in the way by the opposing litigant, and the usual law's delay: *Hayden v. Bucklin*, 9 Paige, 512. The lien will not, perhaps, be impaired by ordinary negligence, and will only be lost by unusual and unreasonable delay. The delay may be explained, but if not explained the question becomes one of culpable laches to the injury of an innocent third person. And what constitutes unreasonable want of diligence, or undue

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delay, must be determined by the particular circumstances of each case: Freeman on Judgments, sec. 202; 2 W. & T. Lead. Cas. Eq. 198 (4th ed.). The lien of an attachment on land has been held to be lost by a delay of two years in prosecuting the suit: *Petree v. Bell*, 2 Bush. 58. And so of a mechanic's lien where there was a delay of four years: *Ehrman v. Kendrick*, 1 Met. (Ky.) 146.

In the case before us, the suit was allowed to sleep upon the reference docket from March 19, 1874, to the October term 1877, when it was transferred to the trial docket, and no step was then taken by the plaintiff, now the defendant, until the February term, 1879. In the meantime, during the first sleep, and after the lapse of over three years, the complainant became the innocent purchaser of the property at its full value. No excuse whatever is offered for the delay, although the defendant is examined as a witness on his own behalf. There was nothing in the character of the litigation to justify the delay. The very fact that the title to the property, and the extent of encumbrances upon it were examined into by an attorney of the court in which the suit was pending, without discovery, shows how completely the cause was retired from public notice, and allowed to sleep by defendant. He has clearly been guilty of that degree of negligence which deprives him of the benefit of the *lis pendens* as against the complainant, an innocent third person without notice.

The cases of *Spence, ex parte*, 6 Lea, 391, and *Ross v. Swan*, 7 Lea, 463, relied upon by the defendant's

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counsel, have no application to this case. In both of those cases, the purchasers claimed under a party whose title was derived by purchase in the pending suit, and their own muniments of title fixed them with notice of suit. The constructive notice thus fixed upon them was equivalent to actual notice. The doctrine of *lis pendens* does not depend upon notice at all.

There is no error in the chancellors's decree, and it will be affirmed with costs.

FREEMAN, J., delivered the following dissenting opinion:

I dissent from the conclusion of a majority of the court in this case.

The plaintiff had fixed his lien on the property by his levy, had the papers returned to the circuit court, an order of sale made, and was actively proceeding to sell the land under that order.

He was stopped by *certiorari* and *supersedeas* of Grant, based on the proposition, that his property was not subject to levy and sale in this case, because the principal debtor had property subject to execution, free from incumbrance. This was not a sufficient legal ground to sustain the *supersedeas*, but on motion of the plaintiff, it was held sufficient, and the court refused to dismiss the petition. The case then stood on the facts alleged, to be shown by proof, that proof to be made out by petitioner.

Plaintiff could not be required to make out a negative, that is that the principal did not have property

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unencumbered subject to execution. That he has not brought the case to trial on the issue in three years or near that period is a matter that cannot be charged on him as laches, or an abandonment of his levy, or even abatement of the rigor of his *lis pendens*. The record shows that in this period the reference docket was not called for trial within the period of several years. But how this can be made to affect the *lis pendens* I am unable to see. It was the business and right of the court to call the docket, not of plaintiff. He could not call this docket for trial, nor do I know any rule of law which would enable him to compel the court to do so, in ordering cases. This being so, the case was pending as other cases on that docket, that docket not being called for trial for several years, and so the plaintiff had no opportunity to press his case. It was however the duty of the other party to take the active part in the case. He held the affirmative. How plaintiff could have sooner compelled him to proceed, I do not see from this record. Certainly I see nothing that shows either an abandonment of his levy, or any culpable neglect of his suit, by which his clear right fixed by his levy was lost.

For these and other reasons that might be given. I respectfully dissent from the opinion of the court.

COOPER, J., upon petition to rehear, said:

In the elaborate argument submitted by the defendant in support of his petition for a rehearing it is not suggested that any material fact in the record

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has been overlooked by the court, nor is a single new authority adduced upon the point on which the case was made to turn in the former opinion of the court. There are some citations of cases where the lien of a judgment, a levy, or of a *lis pendens* has been allowed to prevail after protracted litigation, and apparently unnecessary delay. But not one of these cases shows an issue between the lien creditor and an innocent purchaser pending the litigation upon the laches of the creditor in prosecuting his suit.

The main ground of the argument is one that was considered by the court on the former hearing, namely, that the petition of Grant in the original suit of Roberts v. Bond and Grant was in the nature of a new suit in which Grant was the actor. But no authority is adduced in support of this assumption, nor any argument made to maintain it upon principle. The writs of *certiorari* and *supersedeas* are authorized by law to bring up the record or papers of a cause before a justice of the peace for a new trial, as a substitute for an appeal, or instead of the common law writ of *audita querela* based upon something which has happened since the judgment. In either case the petition is only in the nature of an affidavit, and merely contains a statement of the facts on which the writs are asked. If the petition be sufficient, the case brought up in the first class of cases is tried *de novo*. It is the same case exactly, the parties occupying the same attitude, and the matters are to be tried as before. Such a petition is clearly not a new suit or in the nature of a new suit. If the petition and writs be

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based upon something which has happened since the judgment, they bring up the case as it stood before the justice after judgment, and the petitioner obtains relief or a hearing by moving to quash the execution, or other proceeding complained of: *Linebaugh v. Rinker*, Peck, 363; *Sellars v. Fite*, 3 Baxt., 131. The *certiorari* is directed to the magistrate and the *superseas* to the creditor, officer or person having the execution. A notice is all that is necessary to bring the opposing party into court: *Nicks v. Johnson*, 3 Sneed, 324; *McDowell v. Keller*, 1 Heis. 450. The parties stand exactly as they did before, (Car. Hist. Law Suit, sec. 681,) the burden of proof being usually upon the petitioner to make out his defense, but it may be thrown on the plaintiff by the nature of the issue, as, for example, by a denial under oath of the authority to sign the petitioner's name as stayor: *McDowell v. Turney*, 5 Sneed, 226. The plaintiff before the justice is the plaintiff in the circuit court, and must prosecute the suit.

Petition refused.

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R. E. MASON *et al.* v. SMITH & HARRIS.

DAMAGES. *Appeal bond. Payment of part of judgment.* The damages stipulated for in an appeal bond are the damages in consequence of the appeal, being the interest at the rate of six per cent. per annum upon the amount of the judgment of the lower court from the date of its rendition to the recovery in the appellate court, and any payment made on the debt from the last judgment will be applied by law to the satisfaction of such damages in the first instance.

FROM FAYETTE.

Appeal in error from the Circuit Court of Fayette county. T. J. FLIPPIN, J.

JONES & GALLOWAY for Mason.

T. K. REDDICK, for Smith & Harris.

COOPER, J., delivered the opinion of the court.

Smith & Harris brought an action before a justice of the peace against Alfred Lacy upon a promissory note. The justice rendered a judgment, February 6, 1880, in favor of the plaintiffs against the defendant for \$156.80. Lacy appealed to the circuit court, the present appellants becoming his sureties on the appeal bond. The bond was, however, only conditioned to pay "all costs and damages that may be adjudged against him (the defendant) by the court having cognizance thereof." The cause was tried in the circuit court June 25, 1880, the jury finding a verdict in

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favor of the plaintiffs and against the defendant for \$161.78, whereupon it was considered by the court that the plaintiffs recover of defendant the principal of the note sued on, being the sum of \$89.60, and that the plaintiffs recover of defendant and his sureties of appeal, naming them, the damages, being the interest on said note so found by the jury, to-wit: \$72.18, and the costs of suit.

Upon the rendition of the justice's judgment the plaintiffs sued out an execution by making the necessary affidavit. By virtue of this execution the sheriff levied on certain goods of the defendant, from the sale of which he realized the net sum of \$44.95, and paid the money into court on March 11, 1880. The trial judge ordered this fund to be applied first to the payment of costs, and any surplus to be applied to the discharge of the principal debt. The bill of exceptions shows that the note sued on was executed May 20, 1872, for \$89.60, payable one day thereafter, with interest at the rate of ten per centum per annum. It was contended in the court below that the sureties on the appeal bond were only liable, by way of damages, for the interest from the date of the justice's judgment to the rendition of the judgment by the circuit court. But his Honor, the trial judge, held that the damages for which the sureties were liable consisted of the entire interest on the note, computed at the rate of ten per cent. per annum as called for on the face of the note, from its maturity until the finding of the verdict by the jury. The sureties then moved the court that the fund of \$44.95 be applied to the payment of costs,

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of suit, and any surplus to the satisfaction *pro tanto* of the damages. The court ruled that the fund be applied first to the payment of costs, and any surplus in part satisfaction of the debt as distinguished from the interest or damages. The sureties have brought the case to this court by writ of error, and insist that the rulings below were erroneous.

By the Code, sec. 3162, in actions founded on promissory notes where the defendant appeals from a judgment against him, the appeal bond is required to be conditioned for the payment of the whole debt, damages and costs, and for the satisfaction of the judgment of the superior court where the cause may be finally tried and determined; and in such case the appellant shall pay interest at the rate of twelve and one-half per centum per annum. The rate of interest prescribed by the last clause was changed to six per centum per annum by the act of 1865, ch. 17, brought into the Revised Statutes in sec. 3137*a*. The appeal bond in this case does not conform to the requirements of the statute, and is conditioned only for the payment of "all costs and damages." But it has long been the settled law of the State that where a bond given for the prosecution of a suit, an appeal or a *certiorari*, does not contain all the conditions required, it will be good as far as it goes, if the cause be proceeded with on the faith of the bond, and judgment may be rendered against the principal and sureties to the extent of the bond, and against the principal alone for the residue: *Greer v. Williford*, Peck, 290; *Nichol v. McCombs*, 2 Yer., 83; *Jennings v. Ray*, 8 Yer., 85.

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If, therefore, the bond be only for damages and costs when it should have been for the debt also, the judgment against the surety can only be for the damages and costs.

By an early statute in this State, act of 1809, ch. 49, sec. 27, a penalty of twelve and one-half per cent. on the amount of the judgment, regardless of the length of time the suit had been pending, was fixed as the measure of damages for wrongfully presenting an appeal in error. Afterwards, by the act of 1823, ch. 54, sec. 3, it was provided that upon affirmance of the judgment below, the appellee, in addition to the judgment, should recover interest thereon at the rate of twelve and one-half per cent. per annum up to the time of the rendition of the judgment in the court above. In a case in which the appeal bond was only conditioned for the payment of the cost and damages, it was contended that, under the act of 1823, there were no damages, the statute providing for interest, not damages. But the court said: "We have no doubt the interest after the rate of twelve and one-half per cent. per annum is damages within the meaning of the act of Assembly. It would be difficult to say ordinary interest at the rate of six per centum per annum was not; we understand the court to have said in *Nichol and McAllister v. McCombs*, 2 Yer., 83, it was damages": *Banks v. Brown*, 4 Yer., 198. And so it has been invariably held: *Smith v. Erwin*, 5 Yer., 296; *Tipton v. Anderson*, 8 Yer., 222; *Maxwell v. Salts*, 4 Cold., 235. The decisions since the adoption of the Code are to the same effect, although a new judgment

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be rendered in the circuit court, and although the interest has been reduced from the rate of twelve and one-half per cent. to six per cent: *Mason v. Metcalf*, 4 Baxt., 440; *Mason v. Anderson*, 12 Heis., 38. By the Code, sec. 3163, in all cases of appeal in suits at law, except where the action is founded on the written instruments mentioned in sec. 3162, the bond is required to be conditioned for damages and costs only, and interest shall be recovered at the rate of six per cent per annum. If the bond be conditioned also for the payment of the debt it is void to that extent: *Banks v. McDowel*, 1 Cold. 85. Or, as said in *Hutchinson v. Fulghum*, 4 Heis., 550, the bond will not bind the surety "except as to costs and interest as damages." And in *Sharp v. Pickens*, 4 Cold., 268, although the appeal bond was to "pay and satisfy such judgment as may be awarded," and in double the amount of judgment below, this court rendered judgment against the principal for that judgment, and against him and the surety of appeal "for the damages in consequence of the appeal, which is interest at the rate of six per centum per annum upon the amount of the judgment of the circuit court from the date of its rendition to this time, together with the costs of the appeal." The same construction has been put upon the word "damages" in the bond required for an appeal in chancery cases. In *Dodson v. Dodson*, 6 Heis. 110, an executor appealed from a money decree rendered against him in his representative capacity. He gave bond in double the amount of the decree conditioned for the payment of the decree, damages and costs. The bond

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was not obligatory on the surety so far as it undertook to bind him for the amount of the decree. This court found the executor liable for double the amount of the recovery below, and directed a decree to be entered against him and the sureties on the appeal bond for the amount of decree below with interest from the date of its rendition and for all costs, and against the executor alone for the excess over the chancellor's decree.

The result of these authorities is that the word "damages" in an appeal bond means the damages in consequence of the appeal, that is the interest at the rate fixed by statute upon the amount of the judgment below from the date of its rendition to the time of entering the judgment above. And the damages are recoverable against the surety whenever the appeal is not prosecuted with effect, that is to say where the final recovery is for the same or a larger amount than the judgment below.

An able and ingenious argument has been pressed upon the court by the learned counsel of the appellees to the effect that the bond in this case covers "all damages," and that interest is the "damages fixed by law" for the non-performance of certain contracts: *Bank v. Williams*, 3 Cold., 519; *Nunnellee v. Morton*, Cooke, 21. But if the word "damages" in appeal bonds has acquired a fixed meaning by the decisions of the court which confines it to the interest from the date of the rendition of the judgment below, it would be making another contract for the sureties than the one they entered into if we give the word a different

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meaning in this case. And the very point thus contended for has been made in two of our reported cases. In *Jones v. Parsons*, 2 Yer., 321, the action was assumpsit for building a house, where the recovery was in damages, and the sureties of appeal were released because the bond was not in conformity with the statute. Judge Catron, who delivered the opinion of the court in that case, tells us in a subsequent case, (*Matlock v. Bank*, 7 Yer., 95,) that as the recovery was in damages, the strict words of the bond, which bound the obligors for damages and costs, covered the verdict and judgment; but, he adds, "the securities must have been reached by a construction contrary to the form prescribed by the act of Assembly, and *that* forced, for the damages covenanted to be paid might be the twelve and one-half per cent. interest per annum given by the 64th section of the act, should the judgment be affirmed." In *Gholson v. Brown*, 4 Yer., 496, the action was covenant and the recovery in damages. The appeal bond was only for costs and damages. The point was made that the words of the bond covered the judgment. The court, Catron, C. J., delivering the opinion, said: "We think there is nothing in the distinction attempted that this action of covenant sounded in damages below. * * The securities here are only bound for the damages and costs that may be awarded against their principals in this court for wrongfully prosecuting the appeal." And the court gave judgment against sureties for the damages after the rate of twelve and one-half per centum per annum.

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It is probable that the sureties in the case before us have escaped liability for the judgment of the circuit court by a clerical omission in drafting the bond, and that the ends of justice might be nearer attained by holding them liable for the whole of the interest as damages. But our duty is to administer the law as we find it, not to alter it in order to meet hard cases.

His Honor, the circuit judge, erred also in the judgment rendered in relation to the application of the fund in court. The money was realized, and paid into court before the trial of the cause in the circuit court, and applied by the court after the rendition of the judgment. Treated as a payment either upon the debt or the judgment, there was no application of the payment by any of the parties. The application must therefore be made by the law. No objection is taken to the ruling of the circuit judge that so much of the fund as was necessary should be applied to the payment of the costs of the cause. The general rule in the application of payments by law is that a partial payment shall first be applied to the discharge of interest due, and the balance in discharge of principal: *Jones v. Ward*, 10 Yer., 161. Another rule on the subject adopted in this State is that the law will apply a payment according to the intrinsic justice and equity of the case: *Bussey v. Gant*, 10 Hum., 238. Taking these two rules together, the money should be applied to the interest by way of damages which is given by law upon the amount of the justice's judgment.

It is suggested by the learned counsel of the

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appellees that there would be some difficulty in rendering judgment for part of the interest by way of damages against the sureties, and for the debt and the residue of the interest against the principal. But the cases already cited show that the judgment may be moulded, without difficulty, so as to suit the facts. See Code, sec. 2974. And in *Jenkins v. Skillern*, 5 Yer., 288, where the appeal bond recited the judgment at for a less sum than it was in fact, the court rendered a judgment against the principal for the true amount with the damages, and against the surety "for the sum described in the bond only."

The judgment will be reversed, and judgment rendered here in accordance with this opinion.

THE MEMPHIS BROKERAGE ASSOCIATION in error v.
HUGH B. CULLEN, Clerk of the County Court
of Shelby County.

PRIVILEGE TAX. *Dealers in futures.* A person who receives orders to buy or sell in New York or elsewhere, produce for delivery at a future time, who executes these orders through correspondents, he having no pecuniary interest in the transaction further than charging commissions is a dealer in futures, and under the act of 1883 is liable to a tax of \$1,000.

FROM SHELBY.

Appeal in error from the Circuit Court of Shelby county. J. O. PIERCE, J.

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WRIGHT, FOWLKS & WRIGHT for Association.

ATTORNEY-GENERAL LEA for Cullen.

COOKE, Sp. J., delivered the opinion of the court.

This is an agreed case, the facts are as follows: "The plaintiff in error is a corporation chartered under the laws of Tennessee, and doing business in Memphis by virtue of its said charter, and has been since the 25th of January, 1883. Said plaintiff in error, under its charter, is alone authorized in a "general brokerage business in agricultural products, such as cotton, corn, wheat, and in general produce, such as lard, pork, bacon, etc, and in stocks, bonds, gold, etc," and that said association is engaged in carrying on business strictly in accordance with its said charter, powers and authority.

That said association, as a part of the said business, receives orders from the general public, that is, from any person who desires to engage its services to purchase or sell in New York and Chicago, in behalf and on account of the person so ordering, for delivery at a future period, cotton, corn, general produce, stocks, bonds, etc., that it executes such orders by means of and through its correspondents in New York and Chicago, who purchase or sell in compliance with the orders received from said association; and that said association demands and receives from the person or persons so giving it the orders to buy or sell, as aforesaid, a commission for its services in that behalf, and has no further or other interest of a pecuniary character in the said transaction, and

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that in no instance does said association itself buy or sell said articles for future delivery, but its sole connection with such buying and selling is to transmit the said orders to persons in Chicago and New York with whom said association is in correspondence as aforesaid.

It is further agreed that when said orders of purchase or sale are given to said association, it requires of the person or persons so ordering as aforesaid, a deposit of money for the purpose of protecting the buyer or seller in New York or Chicago, as aforesaid, against loss by reason of fluctuations in the market in the value of the commodity so bought or sold. Said deposit, or, as it is called, "margin," being transmitted by said association to its said correspondents in New York and Chicago, to be held for the purpose aforesaid.

By the act of 1883, ch. 106, sec. 4, brokers (other than real estate brokers) in cities of 20,000 inhabitants or over are taxed \$200; and dealers in *futures* \$1,000 per annum. The defendant, as clerk of the county court, claimed that the plaintiff was a dealer in futures within the meaning of said act, and demanded that it should pay a license as such, which being refused, he issued a distress warrant to collect the same, and was about to levy it upon the property of the plaintiff, whereupon it paid said tax so demanded for one quarter (\$250 State and \$25 county) under protest, and instituted this suit to recover the same, the plaintiff having taken out a broker's license.

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The only question for determination is, do the facts above set forth constitute the plaintiff a dealer in futures, and under it liable for said tax.

The case was tried by the circuit court, who held the plaintiff was such dealer in futures, and rendered judgment in favor of the defendant, and the plaintiff appealed.

We think the judgment of the circuit court was correct, and that the plaintiff was a dealer in futures within the meaning of said act, and liable to pay said tax.

The fact that it carried on said business in connection with and for the benefit of others without the State, as well as its own, can make no difference.

Let the judgment be affirmed.

11L 78
16L 525

GEO. W. SWINK *et al.* v. E. A. FRENCH, Administratrix.

EVIDENCE. *Pedigree. Proved by reputation or hearsay.* Time of birth, as a matter of pedigree, may be proved by reputation or hearsay, without producing the family register, if one exist.

FROM SHELBY.

Appeal in error from the Circuit Court of Shelby county. J. O. PIERCE, J.

Swink v. French.

GREER & ADAMS and HARRIS & TURLEY for Swink.

E. J. & J. C. READ and METCALF & WALKER
for French.

COOPER, J., delivered the opinion of the court.

This is the same case reported, under the style of *Olivia Taylor et al. v. James H. French and John Harbert*, in 2 Lea, 257. The two plaintiffs have since then married and the defendants have both died, the suit being revived against their personal representatives.

Upon application of the defendants, there was, by order of the court, a severance in the trial. The record in the present case contains the result of the trial against the administratrix of French, the verdict and judgment being in favor of the defendant, and the plaintiffs appealing in error.

The action is upon two promissory notes in which James H. French was an endorser, and the object of the plaintiffs was to show to the satisfaction of the jury that he had made himself more absolutely liable than as an ordinary endorser. For this purpose, the plaintiffs introduced testimony tending to show that he had bound himself as a surety or guarantor. The defendant then introduced evidence tending to show a contract between the makers of the notes and the original plaintiffs for an extension of the time of payment for one year after the maturity of the paper without the knowledge of French. To meet this evidence the plaintiffs undertook to prove that at the time of the alleged contract of extension, June 1, 1871, Olivia

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Swink, formerly Olivia Taylor, was under the age of twenty-one years. They introduced the husband, Geo. W. Swink, who testified that his wife was born on July 17, 1850, that she had recently died, and that he was the administrator of her estate. He knew his wife's age, he said, from the entry in the family bible, the bible being then in the possession of another member of the family, in another county than the county in which the trial was being had. The witness further testified that his wife had told him the date of her birth, and he gave the date, July 17, 1850, from that source of information, as well as having seen the entry in the family bible. The trial judge, upon objection of the defendant, excluded this evidence.

Pedigree, by which is meant the lineage, descent or succession of families, all the authorities agree, may be proved by reputation or what is commonly called hearsay. And pedigree, the authorities equally agree, embraces not only descent and relationship, but also the facts of birth, marriage and death, and the times when these events happened: 1 Gr. Ev., sec. 104; 1 Whart. Ev., sec. 208. And the existence of a family register does not exclude proof of declarations of deceased members of the family: *Clements v. Hunt*, 1 Jones, 400. For an entry in such a register is only a declaration of the parent or relation who made it in the matter of pedigree: 1 Gr. Ev., sec. 104. Such evidence is admissible whenever any question of pedigree, as above defined, arises in the progress of a cause. In ejectment, the relationship and death without issue of certain persons were allowed to be proved.

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by reputation: *Flowers v. Haralson*, 6 Yer., 494. So, of relationship upon an issue of *devisavit vel non*: *Ford v. Ford*, 7 Hum., 92. So, on a trial for incest: *Ewell v. State*, 6 Yer., 364. In the case of *Vaughan v. Phebe*, M. & Y., 5, it was conceded by counsel and by the court that it was admissible to prove in this way the time, but not the place of birth. And in *Saunders v. Fuller*, 4 Hum., 516, it was expressly decided, in an action of ejectment, that the period of the death of an ancestor, as well as his relationship, might be proved by reputation or hearsay. It has also been held that there are no grades in the admissibility of such evidence, but that the testimony of living members of the family, and the hearsay of its deceased members are entitled to more weight than the testimony and hearsay of persons unconnected with the family: *Saunders v. Fuller*, 4 Hum., 516.

His Honor, the trial judge, erred therefore, in excluding the testimony under consideration. And the judgment must be reversed, and the cause remanded for another trial.

Railroad v. Trent.

LOUISVILLE & NASHVILLE RAILROAD v. W. C. TRENT.

RAILROAD. *Contract. Shipping stock.* A railroad company shipped a car of stock and the contract to ship provides: "And it is further agreed, that in case of accident to or delay of time from any cause whatever, the owners or shippers are to feed, water and take proper care of stock." The circuit judge charged that in all cases of unavoidable delay, the railroad was by the contract, obligated to feed and water the stock. This was error. The terms of the contract only provide that the owner or shipper shall feed and water the stock in certain defined emergencies, and does not undertake that, in all other cases the carrier shall do so.

FROM FAYETTE.

Appeal from the Circuit Court of Fayette county.
T. J. FLIPPIN, J.

H. B. FOLK and **H. C. MOORMAN** for Railroad.

GEO. HARDIN for Trent.

TURNER, J., delivered the opinion of the court.

In December, 1879, defendant in error shipped from St. Louis to Stanton, Tennessee, a car load of horses under a contract with the St. Louis & Cairo Short Line Railroad.

This suit is brought against the Louisville & Nashville Railroad, one of the connecting lines, to recover damages for injury sustained by the horses, and also an amount paid under protest for feeding the horses at Milan, Tennessee. Amongst others, the contract to

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ship contains the following stipulations: "And it is further agreed,⁹ that in case of accident to or delay of time from any cause whatever, the owners and shippers are to feed, water and take proper care of stock."

"And it is further agreed, that while the said contracting companies' employees shall provide the owner or person in charge of the stock, all facilities in trains or at stations for taking care of the same, the business of the said contracting companies shall not be delayed by the detention of trains to unload and reload stock, for any cause whatever," etc.

The court, in substance, charged the jury, that in all cases except of unavoidable delay, accident or collision, that the railroad companies were, by the contract, obligated to feed and water the stock.

This was error.

The language of the charge is too comprehensive. The terms of the contract only provide that the owner or shipper shall feed, water, etc., in certain defined emergencies, and does not undertake that, in all other cases the carrier shall do so. The latter is a question to be determined from all the facts of the case, and is not, in terms, provided for in the written contract for shipment.

Reversed.

Burgie v. Sparks.

THOMAS R. BURGIE v. SMITH PARKS *et al.*

PLEADINGS AND PRACTICE. *Statute of limitations. Executors.* In an action upon a covenant of warranty of title to land against two executors of the will of the covenantor, one of whom was made a party and served with process within two years of the eviction, and the other was not made a party until after the lapse of that period of time, the plea of the statute of limitations of two years is not a good defense to either; nor, *a fortiori*, to the personal representative of another covenantor properly sued with them, and served with process within the two years after eviction.

FROM DYER.

Appeal in error from the Circuit Court of Dyer county. H. L. W. TURNEY, Spl. J.

LATTA & RICHARDSON for Burgie.

M. M. NEIL and SPL. HILL for Parks.

COOPER, J., delivered the opinion of the court.

Action for the breach of a covenant of warranty of title to land, brought by Burgie against the personal representatives of the covenantors. The verdict and judgment were in favor of the plaintiff for the damages claimed, but the pleas of fully administered were found in favor of the defendants. Both parties appealed in error.

The covenantors, on whose covenant the suit was brought, were Samuel Williams and M. R. Hill. The first died testate, and, before November, 1867,

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Smith Parks and B. M. Taylor were appointed by the county court of Gibson county executors of his will, and qualified as such. M. R. Hill died intestate, and on the first Monday of November, 1867, the same county court appointed Spl. Hill administrator of his estate, and he qualified as such. This suit was commenced September 15, 1874, in the circuit court of Dyer county, against Smith Parks, executor of Samuel Williams, and Spl. Hill, administrator of M. R. Hill, by an original summons issued to Dyer county and a counterpart summons to Gibson county. On September 25, 1874, the original summons was executed on Parks, and on the same day the service of the counterpart writ was acknowledged by Spl. Hill. Each of these defendants, on September 8, 1877, filed a plea in abatement for the non-joinder of B. M. Taylor, the executor of Williams, as a co-defendant. The plaintiff demurred to these pleas. During the argument of the demurrer, at the January term, 1878, the court, upon the application of the plaintiff, permitted him to amend his action by making Taylor a defendant, and, upon the amendment being made, sustained the demurrer. A counterpart summons was then issued to Gibson county on January 19, and executed on Taylor April 20, 1878.

Each of the defendants then filed pleas in bar separately, the defenses relied on being covenants performed and the statute of limitations of two years and six months. On these pleas issues were joined. After the jury were sworn to try the cause, the bill

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of exceptions says that the court, over the objection of the plaintiff, permitted Parks and Taylor to file pleas of fully administered, and required plaintiff to take issue on them. Hill's plea of *plene administravit* seems to have been filed at the same time, but the bill of exceptions contains nothing in relation to it.

No errors have been assigned by the plaintiff in his appeal.

The defendants concede that the court had power, under our liberal statutes of jeofails, to allow the plaintiff to amend his writ and declaration by making B. M. Taylor, as executor, a party defendant, and that their pleas in abatement were thereby rendered of no avail: Code, secs. 2798, 2869. Their contention is that although the statute of limitations of two years in favor of the personal representatives of decedents had not barred the plaintiff's action when the original writ was issued in September, 1874, yet the bar had attached when the amendment was allowed and made in January, 1878, making B. M. Taylor a co-defendant. His honor, the trial judge, thought otherwise, and refused so to charge the jury. On the contrary, he charged that the statute of limitations ceased to run in favor of all the defendants when the original and first counterpart summons were issued. Error is assigned on this ruling.

So far as the defendant Hill is concerned, there seems to be no reason to doubt the correctness of the charge. The suit was commenced as to him by the issuance of the original and counterpart summons

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on the same day, he having only acknowledged service of the latter. The court acquired jurisdiction by the execution of the original writ on Parks and the second counterpart on Taylor, and the fact that one or both of these parties might successfully defend the suit by a plea in bar of the statute of limitations, would be no protection to Hill, the suit having been commenced as to him in time, the cause of action being joint and several, and the statute allowing the verdict and judgment to be good as to one although erroneous and void as to another: Code, sec. 2972 *et seq.*; *Cox v. Crumley*, 5 Lea, 529, 534.

As to the defendant Parks, it seems equally clear, even if the bar of the statute was held to protect Taylor, that the verdict and judgment, upon common law principles, were also valid. If there are several executors, they may plead different pleas. If their pleas go to the merits touching the testator's liability, the plea most to the testator's advantage shall be received: *Chaffe v. Kelland*, 1 Rolle Abr., 929; *Elwell v. Quash*, 1 Stra., 20; *Lyon v. Allison*, 1 Watts, 172. If the pleas simply go to the liability of the executors, as where one pleads a good plea and the other a bad one, or where one pleads *plene administravit*, which is found in his favor, and the other does not, judgment may go in favor of one and against the other: *Baldwin v. Church*, cited, 1 Stra., 20; *App v. Dreisbach*, 2 Rawle, 287; *Geddis v. Irvine*, 5 Penn. St., 308; 3 Williams on Ex., 1942, (6 Am. Ed.). And the rule is general, if one of two persons jointly bound be sued, the omission

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must be taken advantage of by plea in abatement, otherwise the judgment will be good: *Coffee v. Eastland*, Cooke, 159; *Mayfield v. Stephenson*, 6 Baxt., 397. And by statute in this State a suit may be prosecuted against one executor before a justice of the peace, where the other executors have moved from the county or State, and in any court against the executors who remain in the State, where the other executors have removed from the State: Code, sec. 2791 *et seq.* It is further provided that "The same proceedings may be taken in judgments rendered in such separate suits, to subject the defendants for waste of assets, or to subject real estate descended to heirs, as when all the executors or administrators are sued": Code, sec. 2794. And this must be the rule, independent of statute, in all cases in which a plaintiff is permitted to recover judgment against one or more of several executors.

But we think the charge of the trial judge upon the statute of limitations was correct under the circumstances of this case. Whether an amendment will relate back to the commencement of the suit, or operates only from its date, must depend upon whether it merely cures a defect in the original proceedings, or is in substance the commencement of a new litigation. In the latter event, this court has repeatedly held that the statute of limitations continues to run until the amendment is made. It was so held under the old regime, where the form of action was changed: *Crofford v. Cothran*, 2 Sneed, 492; and, under the new regime, where there is a

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change of the ground of action: *Trousdale v. Thomas*, 3 Lea, 715; *Allen v. Link*, 5 Lea, 454; so, when a party has introduced a new cause of action: *Miller v. Taylor*, 6 Heis., 465; or when a party plaintiff is changed from an individual to a personal representative: *Flatley v. M. & C. R. Co.*, 9 Heis., 230; *Hagerty v. Hughes*, 4 Baxt., 222. It is otherwise where the cause of action remains the same. Thus, in ejectment, an additional count in the same title although under a new demise, will relate back to the commencement of the action to avoid the bar of the statute of limitations: *Nance v. Thompson*, 1 Sneed, 321; *Augusta Manufacturing Company v. Vertrees*, 4 Lea, 75. *Aliter*, if the new count be upon a different title: *Corder v. Dolin*, 4 Baxt., 238. In the case before us, the original cause of action was the breach of a covenant of warranty of title by Samuel Williams and M. R. Hill, and the parties to the action were the personal representatives of the covenanters. The amendment neither changed the cause of action nor the character of the parties. It only added a co-executor of one of the covenanters, whose presence was necessary more for the sake of conformity than for utility. For, the executor first made a party could undoubtedly have made any defense which his co-executor could have made on the merits. The pleas in abatement were not filed until September, 1877, and the amendment was made at the January term, 1878. And it is difficult to see how the estate represented by the two executors can be protected by a plea of the statute of limitations.

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in which it is impossible for one of them to join successfully. We think the statute cannot operate in favor of either.

The defendants make some other points which may be briefly noticed. It is said that there is no proof of the payment by plaintiff to Williams and Hill of the purchase money of the land, the title to which was warranted, except the testimony of the plaintiff himself, which was excluded. But the bill of exceptions states that after reading the deed of Williams and Hill to him, "the plaintiff then proved that the purchase money notes were paid shortly after they matured." This was done before the plaintiff's deposition was offered in evidence. And in the absence of direct proof, the recital of the consideration in the plaintiff's deed made in 1855, the subsequent lapse of time, and the proof of the defendant Parks that he had examined the papers of the testator without finding the notes, were sufficient to sustain the verdict in this regard. The record of the Supreme court was evidence of its rendition, and the facts adjudged as between the parties litigant. The appeal, it is true, was only by one defendant to the suit, and not by the present plaintiff. But the court treats the appeal as having brought up the entire record, and affirmed the chancellor's decree generally, which constitutes a part of the record, and shows that the land was recovered from the plaintiff by the opposing litigants. But the objections of the defendants in this regard, and in other matters, are of no avail in view of the issues made by the pleadings.

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In an action for breach of covenant, both by the old forms and in the very nature of the action, there is no general issue. The defendant must plead every matter of defense, and the evidence must correspond with the plea: *Jones v. Johnson*, 10 Hum., 184. The only pleas to the merits in this case were that the covenantors did not covenant as alleged, and covenants performed. All the allegations of the declaration not denied by these pleas must be taken as true: Code, sec. 2910. No objection was taken to the amount of the verdict below, and upon calculation it is found to be correct to a cent.

Judgment affirmed.

TURNEY, J., delivered the following dissenting opinion:

On the 15th of September, 1874, the plaintiff had issued to the sheriff of Dyer county a writ to summon Smith Parks, executor of Samuel Williams, and Spl. Hill, administrator of M. R. Hill, to appear at the October term of the circuit court to answer, etc.

The writ was endorsed "Executed as to Smith Parks on the 25th of September, 1874. Spl. Hill is not to be found in my county."

A counterpart writ was issued to Gibson county for Hill, and endorsed as follows: "Service of this counterpart summons acknowledged as if served by the sheriff of Gibson county, and to have the same effect, and only the same effect, as if executed by the sheriff of Gibson county on me, but no further, and no rights waived. Spl. Hill."

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On the 3d of January, 1876, an original declaration was filed, alleging that Samuel Williams and M. R. Hill had sold to plaintiff a tract of land, with covenants, etc., averring breaches, and that Parks is executor of the will of Williams, and Spl. Hill, administrator of the estate of M. R. Hill.

To that declaration Parks pleaded in abatement that he was not the sole executor of Williams' will, but that B. M. Taylor was joint executor with him.

Hill pleaded in abatement that Parks was not the sole executor of Williams' will, but is joint executor with Taylor, etc., that he cannot be sued with Parks alone, that the court has no jurisdiction of him, etc.

The pleas were filed September 8, 1877. Both pleas were demurred to, the assignment of cause being that they "set forth no reason why the said suit should abate, nor why defendant Hill should not be jointly sued with Parks."

On the 12th of January, 1878, while the pleas were being heard on demurrer, the plaintiff moved for and obtained leave to amend his writ by making B. M. Taylor a defendant, and to issue counterpart writ to Gibson county for him. Thereupon the demurrers were allowed.

Several questions are made in argument, but in the view I take of the case, it is only necessary to notice those raised by the pleas in abatement.

The effect of the holding of the circuit judge is, that the amendment allowed in 1879 related back to the original summons of September, 1874, and made Taylor a party as of that date.

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Both the executors of Williams were citizens of Tennessee. Their administration was an entirety and could only be conducted by them jointly, especially in matters touching a pecuniary liability of their testator. It required both in their representative capacity to occupy the position their testator had occupied in relation to contracts and business transactions. The law recognizes the right of testators to have the united judgments of several to care for the interests of the estate he may leave at his death. So long, therefore, as two or more executors remain citizens of the State, and suit is brought to charge the estate, all must be sued.

By ch. 38, sec. 1, of an act passed in 1826, carried to Code, sec. 2791, it is provided "where one of several executors removes out of the State actions may be prosecuted and judgments rendered against such as remain in the same manner as if all were sued."

This statute clearly indicates that, anterior to its passage no suit could be prosecuted or judgment obtained against one of several executors or administrators, and that in all cases and under all circumstances all must be jointly sued.

Such was the opinion of this court at that time. The question came before the court in 1833, in the case of *Bledsoe, ex'r, v. Huddleston*, 5 Yer., 295. Gore and Bledsoe were the acting executors of Harris. Gore left on a trading excursion to New Orleans. During his absence Huddleston sued out a writ against his co-executor, Bledsoe, who pleaded the facts in abatement. The plea was demurred to.

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Catron, C. J., delivering the opinion of this court, says: "Gore, the co-executor, was absent for some six or eight weeks to New Orleans. During his absence Bledsoe was sued alone as executor of Harris and recovered against. The acts of 1826, ch. 38, and of 1827, ch. 84, provide in case one of the executors has removed (as in cases of attachment) the one within the jurisdiction may be sued. Removal does not mean temporary absence on a journey, but change of residence. Gore had not changed his residence, and the process of the law could have reached him." The judgment was reversed.

So in this case, Taylor had not removed, nor was he temporarily absent. He was still a resident of the county in which the will of Williams was proven and in which he qualified and was acting as executor. If the statute is of any force, and actions may not be prosecuted and judgments shall not be rendered against one of several executors or administrators, it follows as a natural consequence that a suit in form against one of several in his representative capacity is no suit against the estate. To hold otherwise is to repeal the statute.

The legislative declaration that in defined and specified cases one of several representatives may be sued alone, is a declaration that it shall be done in none other. Can it be said that a suit is pending in a case in which the statute provides that no action shall be prosecuted nor judgment rendered? Can a party be said to be in court under proceedings which are not only not authorized but are forbidden in law?

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For the sake of convenience and to save expense and delay, amendments may be made in some cases. Then the general rule is that the institution of suit dates from the amendment.

Flatly v. M. & C. R. R., 9 Heis., 230, was brought by Mary Flatly, the widow, for the use of herself and children, to receive damages for the killing of her husband. The statute provides that the suit shall be in the name of the personal representative and for the benefit of the widow and next of kin. If the representative refuse to sue, the widow, etc., may use his name. The suit was commenced within the bar of the statute. About six weeks after the suit was commenced, and after the twelve months had expired, the style of suit was changed from Mary Flatly, widow, etc., to E. A. Flatly, administrator, etc. The defendant pleaded the statute of limitations of one year. The circuit judge charged the jury that the commencement of the action as to the plaintiff was the day the amendment was asked for and made, making him a party. This was affirmed by this court, Judge McFarland saying: "We cannot see that there is any very strong reason why the law should permit the action to be prosecuted in the name of the personal representative rather than in the name of the widow and children for whose benefit the recovery is to be had. But with this we have nothing to do. We simply declare the law as we find it."

Now, if Mary Flatly and her children, the *real and only parties in interest*, were not in court by

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virtue of their original summons, but only came in upon the amendment making a *disinterested third person*. a party to sue for their benefit, for stronger reasons the amendment, which introduces into the suit a necessary and indispensable defendant, a party in real interest, is the beginning of the suit.

It is said in Flatley's case, "Previous to the enactment of our statutes upon the subject of amendment embodied in the Code, the result of this mistake would have been to compel the abandonment of this action and a resort to a new suit; but this is obviated by the provisions before referred to, which allow the name of a new plaintiff to be substituted. The defendant being in court for particular cause of action, it is not required that the expense and delay shall be incurred of new process, etc. The question is, does this amendment relate back to the issuance of the original summons, and place the new plaintiff in all respects upon the same footing as if the summons had been originally issued in his name? For some purposes, no doubt, the amendment does relate back to the issuance of the original summons; but this doctrine of relation is a mere fiction of law, and should not be applied so as to affect the rights of other parties."

Now, if an amendment which simply changes the style of a case from Mary Flatly to E. A. Flatly, administrator, for the benefit of Mary Flatly, is the beginning of the action, by what process of reasoning can we decide that an amendment bringing before the court a necessary party defendant, without whom no

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action could be prosecuted or judgment rendered, is such an amendment as relates back to the original summons, and is stripped of the principle that "the doctrine of relation is a mere fiction of law, and should not be applied so as to affect the rights of other parties"?

If the rule applied in the Flatly case, and which is fortified by many adjudications, is correct, it is, beyond all doubt, a settlement of the question here.

If the case was not in court as to the estate of Williams, by service of process on Parks, it was not, of course, as to Hill, a citizen of another county, who was served with a counterpart summons.

If there had been no amendment the proceeding would certainly have abated. The amendment was, in contemplation of law, the commencement of the suit.

The authority of elementary or standard writers, or the holding of other courts to a different rule, cannot weaken the force of our statutes and their construction by our courts.

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11L 98
14L 152

LOUISVILLE, NASHVILLE & GREAT SOUTHERN RAIL-
ROAD COMPANY v. PATRICK GUINAN.

1. RAILROADS. *Purchase of tickets. Evidence.* In an action by a passenger against a railroad company for wrongfully putting him off the train for failing to pay the fare demanded, it is competent to prove by himself and other witnesses that they had traveled over the road between the termini of the plaintiff's trip, with and without tickets, and never paid more than the plaintiff tendered to the conductors.
2. SAME. *Regulation about tickets.* A railroad company may, by a regulation of which the public are duly notified, establish a higher rate of fare if paid on the cars than in the purchase of a ticket for the same trip, but the fare can in no event exceed the charge limited by the charter.
3. SAME. *Damages.* Actual compensation is the measure of damages in all instances in which the nature of the case admits of the rule.
4. SAME. *Same. Exemplary.* Exemplary damages are allowed when the wrongful act is done with a bad motive, or so recklessly as to imply a disregard of social obligations, or where there is negligence so gross as to amount to positive misconduct. The turpitude of the defendant's conduct is alone considered, and there must be a wrong intent on his part, or the wrongful execution of a *bona fide* intent.
5. SAME. *Same. Same. Removing passenger from train for non-payment of fare.* Where, therefore, a passenger was removed from the car of a railroad company for the non-payment of the fare demanded by the conductor, acting in good faith and under instructions from the company, in a peaceable manner, without any improper conduct on the part of the conductor, the passenger would not be entitled to exemplary damages unless the act was done with a malicious intent on the part of the company or its employees to defraud or oppress the defendant, or passengers in his situation.

FROM GIBSON.

Appeal in error from the Law Court at Humboldt. J. T. CARTEL, J.

Railroad v. Guinan.

McFARLAND & BOBBITT for Railroad.

H. T. JOHNSON & BRO. for Guinan.

COOPER, J., delivered the opinion of the court.

Guinan sued the railroad company for wrongfully ejecting him, being a passenger, from the company's train of cars. The jury found a verdict in his favor for \$250, and the company appealed in error.

Guinan got on the train at Milan to go to Humboldt, without buying a ticket. The price of a ticket between these points was fifty-five cents. When the conductor went through the train to take up the tickets of the passengers, Guinan tendered him fifty-five cents in silver. The conductor declined to take the money, telling Guinan that the fare required to be paid on the train was sixty cents. Guinan refused to pay any more, insisting that the amount tendered was the usual fare. The conductor said he was acting under orders of the company to collect sixty cents of passengers who did not buy tickets, and if Guinan did not pay that sum he would put him off the train at the next station. Guinan replied that before he would pay any more the conductor might put him off, but if he did, he (Guinan) would see a lawyer about it. The next station was at a point midway between Milan and Humboldt. When the train stopped at the station the conductor told Guinan that he must get off, and he did so. He was "crippled and lame" in one foot and leg, but immediately started along the road for Humboldt. The

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day was warm, and he stopped to rest two or three times. After walking about three miles he was taken up by a hand-car and carried within a mile of Humboldt.

The weight of evidence is, that the distance between Milan and Humboldt by the railroad was about eleven miles, as indicated by the mile-posts of the railroad company. One witness, who had measured the distance with a tape-line for the purpose of erecting a telegraph line, states that the distance was 435 yards in excess of eleven miles. The plaintiff introduced evidence tending to show that the usual fare charged and paid between these points, with or without a ticket, was fifty-five cents. The plaintiff testified that he had traveled over the road between those points for six or seven years, sometimes with and sometimes without a ticket, and had never paid over fifty-five cents. Other witnesses testified to the same effect. The testimony was objected to by the company, but was clearly competent to show that Guinan was acting in good faith, and had reason to suppose that the fare would be the same whether he bought a ticket or not. The company might have proved, if the fact had been so, that it had established a rule, of which the public were properly notified, that the fare between the points would be more on the cars than for a ticket. Such a regulation, within the limitations of the charge by the charter of the company, would have been good: *Lane v. E. T. & Va. R. R. Co.*, 5 Lea, 124. No such proof was made, and the evidence, moreover, as we

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have seen, tended to show that the distance between the points was only about eleven miles, and that therefore no more than fifty-five or fifty-six cents could be charged in any event, the charter of the company limiting the charge for carrying passengers to five cents a mile. The charge of the trial judge to the jury on this branch of the case is not excepted to, and the verdict in favor of the plaintiff that he was wrongfully put off the train was well warranted by the testimony, either upon the ground that the company could not charge sixty cents for the distance between the termini of the trip, or upon the ground that the plaintiff had good reason to believe that the charge would only be fifty-five cents, with or without a ticket.

The only ground of real contest in the case grows out of the rulings of the court in relation to exemplary damages. After explaining to the jury what are compensatory damages, his Honor said: "There may be exemplary damages, or smart money as it is called, and the object of this kind of damages is not so much to compensate the injured party as to punish the party inflicting the wrong, and to promote the interest of the community and do justice at the same time to the injured party. But exemplary damages are not given for every wrong done, and are not allowed in any case unless the injury done is wanton and oppressive, and whether the injury is wanton and oppressive is for the jury to decide from all the facts and circumstances attending it, considering the time, place and manner, and all of the circumstances. An

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act may be wanton or oppressive although done in a quiet and gentlemanly manner, or it may not be so; for each case depends upon its own special facts." His Honor added: "The plaintiff is not entitled to damages simply because he is a cripple, and you can only look to that to see what inconvenience and expense he was put to, if any, on that account."

The company requested his Honor to give the following additional charge, which he refused to do: "If no force was used in ejecting Guinan from the cars, and no insulting language used to him or insult offered him, and he got off merely at the words of the conductor that he would have to put him off, and the conductor acted towards him all the time in a peaceable and kind way, and in good faith, then plaintiff can only recover actual damages, and cannot recover exemplary damages."

The jury, after being out some hours, returned into court, and asked the judge to charge them again as to punitive and vindictive damages. His Honor said to them: "If the act was wanton and oppressive, they might give vindictive damages, and to ascertain whether the act was so, they might look to the time and place when and where put off, the crippled condition of the plaintiff," etc. One of the jury asked if the act could be wanton and oppressive when there was no force used or abusive words. The judge replied: "That an act might be oppressive when it was done in a kind, pleasant and polite manner. It would depend on all the attending circumstances, and it was for the jury to find how that was."

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In cases growing out of the non-performance of contracts or of duties imposed by law, or arising from the violation of rights, in which there is no element of fraud, oppression, willful negligence or malice, the wrongdoer acting under a mistaken idea of his own rights and in good faith, the compensation to which the injured party is entitled as damages consists only of the direct pecuniary loss. Where fraud, malice, gross negligence or oppression intervenes, the law blends the interest of society and of the aggrieved individual, and gives damages such as will operate as an example or warning to the party or others to deter them from similar transactions: *Dougherty v. Shown*, 1 Heis., 302; *Railroad Co. v. Garrett*, 8 Lea, 439; *Cox v. Crumley*, 5 Lea, 529. Actual compensation is the measure of damages in all instances where the nature of the case admits of the rule: *Nashville & Chattanooga Railroad Co. v. Smith*, 6 Heis., 174. To entitle the injured party to exemplary damages there must be aggravating circumstances, and the turpitude of the defendant's conduct is alone considered. Exemplary damages are allowed when a wrongful act is done with a bad motive, or so recklessly as to imply a disregard of social obligations; or where there is negligence so gross as to amount to positive misconduct: 1 Suth. on Dam., 723; Sedgw. on Dam., 33. If a person act under a mistaken sense of duty, and without any intention of oppression, it is a case for compensatory not exemplary damages: *Wiggin v. Coffin* 3 Sto., 1. There need not be positive proof of

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malice or oppression, if the transaction, or the facts shown in connection therewith, fairly imply its existence: *Magee v. Holland*, 3 Dutch., 86. And it is left to the jury to look at all the circumstances in order to see whether there was anything in the conduct of the defendant to aggravate the damages: *Johnson v. Perry*, 2 Hum., 569; *Byram v. McGuire*, 3 Head, 530.

In the case before us, the jury were warranted in finding that the plaintiff was wrongfully removed from the cars, but he was removed without any violence or indignity, and at a regular station on the road. The conductor, so far as appears, acted in good faith in obedience to instructions from his company. The plaintiff reached his destination without expense, within an hour or two of the time by rail, walking two or three miles. And he voluntarily preferred to take this course rather than pay five cents, which he might have recovered by law if illegally taken. The record does present a case of grave doubt as to the right to exemplary damages, and the jury manifestly thought so when they applied to his honor for further instructions. Under these circumstances, the charge should have been full, clear and accurate on the point of difficulty. The charge, in fact, ignores the real difficulty. That difficulty was in finding any of the grounds for exemplary damages in fraud, malice, oppression or gross negligence in either the conduct of the railroad company or the conductor. And the charge gives no aid to the jury in this regard, while the charge in reply

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to the request of the jury misleads them in one respect in which the original charge was correct, namely, the crippled condition of the plaintiff. That was a consideration for compensatory not exemplary damages.

In ascertaining whether the plaintiff is entitled to exemplary damages, "the turpitude of the defendant's conduct is alone considered": 1 Suth. on Dam., 723. The fraud, malice, gross negligence or oppression, which aggravates the damages, must exist on the part of the defendant, or, if the defendant be a corporation, on the part of its officers. If the defendant, in good faith, act under a mistaken sense of duty, or erroneous belief of right, without any intention to oppress or defraud, or without any actual oppression or indignity, the case is one for compensatory, not exemplary damages. If what is done be done with a fraudulent, malicious or oppressive intent on the part of the wrong-doer, there would be ground for exemplary damages, although, to use the language of the trial judge in his charge, "the act be done in a quiet and gentlemanly way." So, on the other hand, although there be neither malice nor fraud, nor intent to oppress on the part of the wrong-doer, yet if the act be done in a rude, insulting or reckless manner, in disregard of social obligations, or with such gross negligence as to amount to positive misconduct, there would be ground for exemplary damages. There must be a wrong intent or a wrongful execution of an honest intent.

In the case before us, the mode of removing

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Guinan from the cars seems to have been entirely unexceptionable, and the conductor almost certainly acted in good faith and under instructions from the company. And the defendant was entitled to have the jury instructed that if they so found, the case was not one, so far as the acts of the conductor were concerned, for exemplary damages. So, when the jury asked if the act could be wanton and oppressive when there was no force used or abusive words, his Honor should have told them that the act would not be wanton and oppressive unless done with a malicious intent on the part of the company or the conductor to defraud or oppress the defendant, or passengers in his situation.

The judgment will be reversed, and the cause remanded for another trial.

SUSAN S. BROWNING v. RICHARD H. BROWNING *et al.*

CHANCERY PLEADINGS AND PRACTICE. *Sale of minor's land. Guardian ad litem* A guardian *ad litem*, appointed in a pending suit by a third person against an infant, has no authority by filing his answer as a cross-bill to obtain the sanction of the court to an unauthorized sale of the infant's realty.

FROM HAYWOOD.

Appeal from the Chancery Court at Brownsville. H. J. LIVINGSTON, Ch.

Browning v. Browning.

E. J. & J. C. Read for complainant.

A. D. BRIGHT and THOMAS STEELE for defendants.

COOPER, J., delivered the opinion of the court.

The tract of land in controversy was owned originally by S. T., T. E. and George Blair, brothers, under a conveyance from their father, E. S. Blair. George Blair died leaving a widow, Nancy Blair, and one son George D. Blair. In this state of affairs, on August 1, 1871, S. T. Blair, T. E. Blair, Nancy Blair, and E. S. Blair, the latter probably acting for his grandson, George D. Blair, then an infant of tender years, seem to have entered into a contract with J. L. W. Browning, the husband of the complainant, Susan S. Browning, to sell him the tract of land for \$3,824, for which J. L. W. Browning executed his three notes on time, one payable to E. S. Blair, S. T. Blair, T. E. Blair and Nancy Blair for \$1,912, and two of them payable to S. T. Blair, Thomas Blair and Nancy Blair for \$956 each. These notes are all dated August 1, 1871, and recite on their face that they are given for land that day bought by Browning from the payees, and for the payment of which a lien is retained on the land. At the time, a deed of conveyance of the land was drawn up between S. T. Blair, T. E. Blair, Nancy Blair and E. S. Blair of the first part, and J. L. W. Browning and Susan S. Browning, his wife, of the second part, whereby the parties of the first part, in consideration of \$3,824 cash in hand paid, sell and convey the said

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land to the parties of the second part and their heirs forever, with covenants of seizin, right to convey and against encumbrances, and with the further covenant of general warranty of title. This deed, in the copy exhibited in the record, is only executed by S. T., T. E. and Nancy Blair, although the probate] shows also an acknowledgment by E. S. Blair. There is no doubt that it was part of the contract of the parties that proceedings should be instituted in the chancery court to perfect the title by procuring the sanction of the court to the sale of the land on behalf of the infant George D. Blair. Accordingly, on December 30, 1871, S. T. Blair, T. E. Blair and J. L. W. Browning join in filing a bill in the chancery court against Nancy Blair and George D. Blair for the purpose, in which the contract is set out as having been made between S. T. and T. E. Blair of the one part, and J. L. W. Browning of the other part. The prayer is that the contract of sale be confirmed, the title of the land be divested out of the other parties and vested in J. L. W. Browning, subject to a lien for the balance of the purchase money unpaid. J. L. W. Browning died in March, 1872, leaving surviving his widow, Susan S., and several children. His death was suggested, and the widow and children brought before the court by *scire facias*. R. H. Browning was appointed and qualified as administrator of the estate of the deceased. During the progress of this cause, the administrator paid so much of the purchase money of the land as constituted the shares of S. T. and T. E. Blair. The widow having expressed

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her willingness to take the value of her dower interest in money, the value was ascertained to be \$344, and this amount of the purchase money was also paid to her. The residue of the purchase money, upon calculation, was found to be on March 17, 1875, \$865.10. The court had already declared its willingness to sanction the sale on behalf of the infant upon payment of the purchase money, but had reserved the confirmation until such payment. By this time, the estate of J. L. W. Browning had been exhausted, the land vesting in the widow by right of survivorship under the joint deed to her husband and herself. Under these circumstances, the court agreed to an extension of time for the payment of the share of the minor, upon the administrator giving his note with security for such balance of purchase money, reserving a lien on the land for its payment. The note was executed and made payable to the clerk and master of the court, who afterwards took judgment upon it, and thereupon the administrator obtained an order for the sale of the land in satisfaction thereof under the lien reserved. The original bill in the present cause was then filed by the widow, and further proceedings under the decree enjoined, upon the ground that she was no party to the suit in which they were had. The bill concedes that the infant George D. Blair has never parted with his title to one-third of the land, and prays, among other things, that his one-third interest be set apart to him. The answer of George D. Blair by his guardian *ad litem* was filed as a cross-bill for the purpose of securing his rights upon the facts. The

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chancellor held that the proceedings in the case of S. T. Blair *et al.* v. Nancy Blair and George D. Blair were null and void; that it was to the interest of the said George D. Blair to confirm the original sale to Browning upon the payment of the balance of the unpaid purchase money; and that this could be done in the present suit. He therefore rendered a decree in favor of George D. Blair for the balance of purchase money unpaid as ascertained in the former suit, with interest, declared the amount to be a lien on the whole land, and ordered the land to be sold in satisfaction thereof if the money was not otherwise paid. The widow, Susan S. Browning, alone appealed.

The original contract for the purchase of the land in 1871, was made by J. L. W. Browning, the husband, and he or his estate has paid all the purchase money that has been paid. The wife, Susan S. Browning, is a mere volunteer taking title stipulated for by the husband. Although she was never bound for the purchase money, she took the land subject to the lien for the purchase money: *Jackson v. Rutledge*, 3 Lea, 626; *Willingham v. Leake*, 7 Baxt., 453. The husband was well aware at the time of the defect in the title, and accepted a deed under a general covenant of warranty, and went into possession under it. It was a part of the contract of sale that proceedings should be instituted to perfect the title, and he himself joined in the suit which was afterwards brought for the purpose. Time, it has been expressly held, will be no objection to the specific enforcement of a contract for the sale of land during the

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mutual forbearance of vendor and vendee on account of the embarrassment of the vendor's title: *Craig v. Leifer*, 2 Yer., 193. And the knowledge by the purchaser of the ground of embarrassment deprives him, and a volunteer under him, of all right to complain of the delay incident to its satisfactory removal, his possession not being disturbed: *Chadwell v. Winston*, 3 Tenn. Ch. 110; *McClure v. Harris*, 7, Heis., 379; *Mullins v. Aiken*, 2 Heis., 545. The purchaser cannot rescind if the title is perfected before final decree: *Winfrey v. Drake*, 4 Lea, 293. And the power of a court of chancery to consent to a sale of the infant's land is clear: *Elliott v. Blair*, 5 Cold., 185; Code, sec. 3323 *et seq.*; *Gray v. Barnard*, 1 Tenn. Ch. 298.

But the difficulty in this is that the Code, sec. 3323, *et seq.*, prescribes the mode in which the court of chancery may, for and on behalf of a person laboring under the disability of infancy, consent to and decree a sale of the property of an infant. The application, it is expressly provided, must be made by the "regular guardian" of the infant: Sec. 3324. The statute intended the delicate responsibility of initiating such proceedings should only be entrusted to a person legally bound to act for the benefit of the infant. A guardian *ad litem* appointed to defend a pending suit is not entrusted with such a power. Whether the court of chancery, under its general jurisdiction, might be authorized to depart from the letter of the statute upon an application made by a father, or other near relation of an infant, in the capacity of next friend, it is not necessary to deter-

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mine: *Mason v. Tinsley*, 1 Tenn. Ch., 154. It is sufficient to say that the power is not vested in a mere guardian *ad litem*.

It is obvious that the infant in the case before us has never parted with his title to one-third of the land in controversy. It is equally clear that the sale which has been made of his share in the land may be sustained by the court upon proper proceedings in his behalf. There is a right of election as to the relief which it would be most to the interest of the infant to pursue. A regular guardian is the proper person to make that election and initiate the necessary proceedings to effectuate it. If it should be found for the interest of the infant to take the land, the value of the dower of the infant's mother should be deducted from the rents recovered. If the election should be to sanction the sale, the recovery could only be for one-third of the purchase money of the land, after deducting the value of the mother's dower, as was done in this case.

The decree of the chancellor will be reversed, and the cause remanded to the chancery court for further proceedings in accordance with this opinion.

The costs of this court will be paid, one-half by the complainant and the other half by the infant, the latter amount to be paid out of the eventual recovery in this case.

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STATE v. D. D. THOMAS.

CRIMINAL LAW. *Forfeiture against witnesses.* Forfeiture may be taken against a witness regularly subpoenaed although it does not affirmatively appear that the default of the witness was willful.

FROM SHELBY.

Appeal in error from the Criminal Court of Shelby county. L. B. HERRIGAN, J.

ATTORNEY-GENERAL LEA for the State.

_____ for Thomas.

DEADERICK, C. J., delivered the opinion of the court.

Defendant was a material witness duly summoned by the sheriff of Shelby county on behalf of the State to give evidence in a cause pending in the criminal court of said county, of *State v. John Robinson*, for larceny. The trial of the cause was set for the 29th day of September, and on that day the defendant was, by due service of subpoena upon him on the 28th of September, required to attend and testify. He was marked prosecutor as well as witness upon the indictment, and was in the city of Memphis when the cause was called for trial, but then and there failed to answer, and made default, and failed to appear according to the command of

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the subpoena. Thereupon the Attorney-General moved the court for a forfeiture on the subpoena against said D. D. Thomas, which motion the court overruled, on the ground that before any forfeiture on subpoena would be allowed, the Attorney-General would be required to show to the court affirmatively that the default of said witness was willful.

To this ruling the Attorney-General excepted, and prayed an appeal to this court.

Section 5386 of the Code provides that the same proceedings may be had against defaulting witnesses in criminal causes as are prescribed in civil cases, citing sec. 3821 of the Code.

The attendance of a witness is procured by the service of subpoena or summons, and he is bound to appear at the time and place named, and continue to attend from day to day, unless discharged by the court or the party summoning him: Code, secs 3814, 3820. "And in default thereof (of appearance) he forfeits to the party at whose instance the subpoena issues the sum of \$125, to be recovered by *scire facias*," etc.: Code, sec. 3821. And the next section (3823, provides: "Upon the return of the *scire facias* issued for the penalty, the witness may be relieved by showing sufficient cause for failing to attend, otherwise judgment, on motion, will be given against him and execution issue accordingly." Section 3824 of the Code further provides that the attendance of witnesses in criminal cases shall be enforced in the same way and subject to the same rules as in civil cases, except that the penalty for failing to

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attend in criminal cases is \$250, instead of \$125 in civil cases.

We have not been referred to any other statutes bearing upon the question, and have been unable to find any which modify the conclusions drawn from those cited.

It is obvious that a witness who has been regularly summoned to appear at a specified time and place and give evidence, is under legal obligation to appear as commanded. And if he fails to so appear, *prima facie* he is in default. In the language of the Code, "he forfeits to the party," etc., to be recovered by *scire facias*. But he has the right to plead to the *scire facias* any legal excuse for such failure, and thus relieve himself from the forfeiture.

It is the failure to obey the summons that gives the right to the forfeiture to be prosecuted by *scire facias*, and the privilege of pleading his excuse to the *scire facias* is conferred on the witness for his protection against its enforcement in case he has a sufficient cause for failing to attend. His failure to attend as commanded is the default which entitles the party summoning him to a conditional recovery of the penalty, which the witness may defeat upon showing in plea and proof to the *scire facias* that he had a sufficient legal excuse for such failure.

The burden of the proof to exonerate himself is upon the witness when he fails to obey the process of the court. And the law does not require the State or party to make out a case of willful diso-

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bedience before taking the forfeiture given by the statute simply for failing to attend.

The judgment of the criminal court judge was erroneous and will be reversed.

11L 116
1pi 69
4pi 38
4pi 324

LOUISVILLE & NASHVILLE RAILROAD COMPANY v.
BARTLETT MASON.

1. **DAMAGES.** *Railroads. Evidence.* In an action against a railroad company, as a common carrier, for damages to horses in transit, the measure of damages would be the value of the horses killed and the depreciation in the value of those injured, at the place of delivery, but direct testimony by the opinion of witnesses of that value or depreciation is not indispensable; it is sufficient if there is proof of these facts in the market of a neighboring State connected with the place by railroad, and a full description of the animals and their qualities, and of the character of the injuries.

SAME. *Same. Same. Charge of court.* Under such circumstances, it is not error to charge the jury that they may fix the amount of the plaintiff's damages, if they find for him, from the age and qualities of the stock, and the nature of the injuries as shown by the proof, although no witness has given an opinion as to the value of the stock or the amount of damages at the place of delivery.

FROM GIBSON.

Appeal in error from the Law Court at Humboldt.
J. T. CARTHEL, J.

McFARLAND & BOBBITT for railroad.

WARE & MARTIN for Mason.

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COOPER, J., delivered the opinion of the court.

Action by Mason against the railroad company for damages in the killing of one horse and injuring two other horses by the negligence of the servants of the defendant as a common carrier, in transporting the horses from Louisville, Kentucky, to Milan, Tennessee. The jury found a verdict in favor of the plaintiff for \$175, and the defendant appealed in error.

The plaintiff gave his own deposition and took the deposition of one Ramsey in support of the action. These depositions were taken in Grant county, Kentucky, and are somewhat loose and meagre. On the trial, the plaintiff rested upon his own deposition, and Ramsey's deposition was read by the defendant. No other testimony was introduced. The plaintiff in error now insists that the evidence shows that the plaintiff below and Ramsey were joint owners of the horses for whose loss and injury the suit was brought, and that the verdict is otherwise unsupported by the proof. The testimony shows that two car loads of horses were shipped by the defendant's road at Louisville, Kentucky, to Milan, on the same train, the plaintiff being in charge of one of these cars, and Ramsey of the other. Each car seems to have contained twenty horses. In the loose and inartificial way in which the depositions are taken, both witnesses use language from which it might be inferred that they were joint owners of the stock. The counsel of the plaintiff seems at first to have put that construction upon the language, for he

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obtained leave of the court to amend and actually amended by making Ramsey a co-plaintiff. This was afterwards corrected by dismissing Ramsey from the case. The point now made was no doubt submitted to the jury upon a charge which has not been excepted to, and they have found that Mason was sole owner of the horses in controversy. The finding is warranted by the testimony. For the plaintiff, in his deposition, treats the horses as belonging to him, and the cross-examination of the railroad company takes the fact for granted in both depositions. The equivocal words are due to the fact that the shipments of each witness were made at the same time, and included the same number of horses.

Both of the witnesses concur in testifying that the horses were injured in the transportation from Louisville to Milan. The plaintiff below deposes that one of them was so badly injured that he refused to receive it from the company. He added, and the statement was read without objection, that he understood the horse was dead. In the absence of any evidence to the contrary, this was sufficient to warrant the jury in finding damages for the loss of one horse and for the injury to the others.

The only point of real difficulty in the case is raised by the charge of the court on the measure of damages. The plaintiff testified that the horse which was killed was a red roan, blaze-faced, one glass eye, about 15½ hands high, with no disease of any kind, sound as a dollar, going all the gaits well,

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and worth \$175, adding that the animal "would have brought that amount in the market." He is then asked: "What was the market value of the horse at Milan or in the market?" His answer is: "I could have sold the horse when I shipped for \$175." He further testifies that the other horses were damaged \$50. The witness Ramsey says that the horse killed was between four and five years old, and a good saddle horse. He is asked if he knew the value of the horse in the markets, and replies in the affirmative. He is also asked: "What was the market value of the horse left at Milan, and what was the amount of damage to the other horses?" His answer is: "I say \$125. and they were damaged about \$150." Both of the witnesses say, in answer to a question directed to the point, that when they speak of the market value, they mean the market in Mississippi.

Upon this testimony if his Honor, the trial judge, directed the jury, as he probably did, the record not showing the entire charge, that they must find the value of the lost horse, and the damages of the other horses, at Milan at the time when they should have been delivered by the company to the plaintiff, the verdict would have been sustained by the evidence. For the plaintiff's answer above, "I could have sold the horse when I shipped for \$175," might well be considered as giving the market value at Milan, to which his attention was directed by the question.

His Honor, however, upon the supposition that

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the jury might find that there was no evidence of the value of stock at Milan, added the following charge, which is excepted to: "If you find from the testimony that the stock of plaintiff in controversy was shipped to Milan Tennessee, and that the plaintiff is entitled to recover damages for injuries done by the defendant to his stock, then the jury may assess the damages from the testimony as to the age and qualities of the horse that is claimed to have died, and from the testimony as to the nature of the injury to the other stock of plaintiff, if any of his other stock were injured, although no witness gave his opinion as to the value of the horse at Milan that died, if either died, or gave his opinion as to the amount of damages done to the other stock at Milan, if plaintiff's other stock were injured by defendant. For the jury may fix the amount of plaintiff's damages, if they find for him, from the age and qualities of the stock, and the nature of the injuries as shown by the proof, although no witness has given an opinion as to the value of the stock or the amount of the damage at Milan."

The charge must be taken in connection with the fact that there was proof of the value of the horses in the market of the State of Mississippi. The true measure of damages was the value of the horses at the time and place where the defendant, as a common carrier, was bound to deliver the animals to the plaintiff. The horses were shipped at Louisville, but it does not appear positively to what point they were to be carried. It is fairly inferable that they were

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to be transported to Milan for the Mississippi market. The most satisfactory evidence of their value at Milan would have been direct testimony to that effect. But such testimony was clearly not indispensable. It has been held by this court that in a suit for the recovery of damages for the breach of a contract made in this State for the delivery of a mining corporation in this State, the value of the stock might be ascertained by its market value in the large cities of the eastern seaboard, where such stocks had a marketable value: *Henegar v. Isabella Copper Company*, 1 Cold., 241. So of the State bonds of an adjacent sister State: *Doak v. Snaff*, 1 Cold., 180. The value in both cases to be subject to a deduction for the expense of converting them into money by sending them to the best market. The principle of these cases was extended to the case of a conversion of cotton in Hardeman county, in this State, where the only proof of the value of the cotton was evidence of its value at Louisville, Kentucky. The competency, as well as the sufficiency, of the evidence was objected to. The court held, Nicholson, C. J., delivering the opinion, that the evidence was not only competent, but sufficient to sustain the verdict. The means of communication, said his Honor, between the different parts of the country are so easy and rapid, that the market price of a commodity of trade at a commercial center may properly be looked to in ascertaining values, subject to a deduction for the expense of converting the commodity into money: *Fort v. Saunders*, 5 Heis.,

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487. And this is the general rule when the value can only be ascertained by proving the market price at the nearest point where the goods or chattles of the quantity in question can be bought and sold: 2 Suth. on Dam., 373.

The case before us falls within the principles settled by the decisions just cited. The evidence of the value of the horses in the Mississippi market was clearly competent, and, in the absence of any countervailing testimony, was sufficient to sustain the verdict: *Muller v. Eno*, 14 N. Y., 597. It is not a case of the total absence of any testimony of the value of the horses and of the damages sustained, but of positive testimony of such value and damages in a market for such animals in direct communication with, and in a few hours' travel of, Milan. The jury were properly left to exercise their own judgment and apply their own knowledge and experience to the subject. They are not required to accept, as a matter of law, the conclusions of the witnesses instead of their own. "While they cannot," to use the language of Mr. Justice Field in a recent opinion, "act in any case upon particular facts material to its disposition resting in their private knowledge, but should be governed by the evidence adduced, they may, and to act intelligently, they must, judge of the weight and force of that evidence by their own general knowledge of the subject of inquiry": *Head v. Hargrave*, 105 U. S., 45. The rule was applied in that case to the ascertainment of the value of professional services, where, if ever, the testimony of

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experts would be conclusive. In the ascertainment of the value of realty taken for public purposes, the Supreme Judicial Court of Massachusetts sustained a charge to the jury, "That, in estimating the amount of damages, if any of them knew of his own knowledge any material fact which bore upon the issue, he ought to disclose it, and be sworn and communicate it to his fellows in open court in the presence of the parties; but that, in making up their verdict, they might rightfully be influenced by their general knowledge on such subjects, as well as by the testimony and opinions of witnesses": *Patterson v. Boston*, 20 Pick., 159. In another case, in which the witness had testified as to the quality, condition and cost of certain goods, and given his opinion as to their worth, the same eminent court said: "That the jury were not bound by the opinion of the witness; they might have taken the facts testified by him as to the cost, quality and condition of the goods, and come to a different opinion as to their value": *Murdock v. Sumner*, 22 Pick., 156. The Supreme Court of Kentucky seems to have gone a step farther, and held that the jury may fix the price of property sued for from the description given by the witnesses, although the witnesses are themselves silent as to the price: *Craig v. Derrett*, 1 J. J. Mar., 366. And the Supreme Court of North Carolina seems to have held the same doctrine as to the province of the jury in estimating the value of services: *Madden v. Porterfield*, 8 Jones, 166.

In the case before us the witnesses give such a

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detailed description of the physical characteristics, qualities, and other conditions of the horse killed by the defendant, that perhaps the jury might from their general knowledge have approximated its value. They could certainly do so with more accuracy than they usually do in ascertaining damages in actions of tort. But, in addition, they had before them direct testimony of value in a neighboring market, if not at their own door, and might safely be trusted, from the data and their own general knowledge of the subject, "to fix the amount of the plaintiff's damage," as they have done. In this view, and construing the language of the judge in connection with the facts, the charge was correct.

The judgment must, therefore, be affirmed.

WM. REVES v. THE STATE.

SHERIFF. *Special deputy sheriff.* A special deputy sheriff appointed for one year to preserve the peace and prevent infractions of the law, and to make arrests and deliver all prisoners to the county jail, is a civil officer within the meaning of the Code, sec 4750, and entitled to the sum of \$50 in the bill of costs for arresting and prosecuting to conviction any person guilty of the offenses mentioned therein.

FROM SHELBY.

Appeal in error from the Criminal Court of Shelby county. L. B. HARRIGAN, J.

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T. W. BROWN for Reves.

ATTORNEY-GENERAL LEA for the State.

COOPER, J., delivered the opinion of the court.

By the Code, sec. 4750: "Any civil officer arresting and prosecuting to conviction any person guilty of any of the offenses enumerated in this article, shall be entitled to the sum of fifty dollars in the bill of costs." The plaintiff in error was convicted of one of these offenses, and Joseph P. Miller moved the court to allow him fifty dollars in the bill of costs under the statute. The motion was opposed by the State and the defendant upon the ground that Miller was not a "civil officer" within the meaning of the statute. The court sustained the motion, and the Attorney-General appealed. It is shown by the bill of exceptions that Miller arrested the defendant in his (Miller's) own neighborhood, and prosecuted him to conviction for the offense charged. Miller acted under the following appointment:

OFFICE OF SHERIFF, OF SHELBY COUNTY.

P. R. ATHEY, Sheriff.

MEMPHIS, TENN., Aug. 15, 1882.

Joseph P. Miller is hereby appointed a special deputy sheriff to preserve the peace and prevent infractions of the law, and deliver all prisoners to the county jail to be held for trial or until discharged by law. Good for one year from date, without salary or expense to me.

P. R. ATHEY,

Sheriff of Shelby county.

By the act of 1870, ch. 8, (Code, 359a,) it is provided: "The sheriff of each and every county in the State shall have as many regular deputies as he may desire, or may, in his option, be necessary to a

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faithful and efficient performance of his duties as such sheriff, and may appoint any number of special deputies on urgent occasions, to hold elections, or where required for particular purposes." The statutory policy of this State was for many years to restrict the number of regular deputies which the sheriff might appoint, and permit special deputations only upon "urgent occasions": *Montgomery v. Scanland*, 2 Yer., 337. But even under these statutes, a special deputy in a particular case would have all the power of a regular deputy in that case, and it was not necessary that the deputation should show that an "urgent necessity" existed: *State v. Kiser*, 4 Sneed, 563. The act of 1870 shows a change of policy by the State, for the sheriff is thereby authorized to appoint as many regular deputies as he pleases, and special deputies on urgent occasions, of which he alone is to judge, "or when required for particular purposes." Broader authority could scarcely be conferred. And the deputation under which Miller acted is clearly within the power. Any deputy of the sheriff, whether general or special, who is authorized to make an arrest of a person charged with crime must be considered a "civil officer" *pro hac vice*. He is a deputy sheriff for the occasion, legally appointed, subject to the liabilities, and entitled to the fees and emoluments of a regular deputy. Whether the sheriff pays him a salary or not, or is bound to bear his official expenses, is a matter of contract between them with which the public have nothing to do, and the terms of which cannot

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change his official character. And whether the appointment be general, or for a definite period, it is held at the will of the sheriff.

The judgment must be affirmed.

THE CHICAGO, ST. LOUIS & NEW ORLEANS RAILROAD
COMPANY v. N. N. POUNDS, Adm'r.

CONSTITUTIONAL LAW. *Retrospective laws. Damages.* The act of the Legislature of March 26, 1883, which provides that section 2291 *et seq.* of the Code be so amended that damages resulting to parties for whose use and benefit the right of action survives, from the death consequent upon the injuries received, shall be recoverable in such action, does not apply to suits where the cause of action arose prior to the passage of the act. The act constitutes a new or additional cause of action. The rights of the parties were fixed under the law as it existed at the time of the injury, and the law which undertook to change those rights would be retrospective and void.

FROM GIBSON.

Appeal in error from the Law Court at Humboldt.
J. T. CARHELL, J.

HILL & WILLIAMSON, A. W. CAMPBELL and JAS.
FENTRESS for railroad.

J. S. COOPER and T. J. HAYS for Pounds.

COOKE, Sp. J., delivered the opinion of the court.

J. H. Pounds, the intestate of the defendant in

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error, was run over by a locomotive and train of cars of the plaintiff in error on its road and killed, and this action was instituted by his administrator for the benefit of the children of the deceased. There was a verdict and judgment in favor of the plaintiff below. A new trial was refused, and the defendant appealed.

It is insisted here that there was no evidence to support the verdict, or at least the preponderance of testimony is so great against it as to shock the conscience of the court, and therefore a new trial should be granted.

We do not concur in this. There was an apparent conflict in the testimony, but the jury were the exclusive judges of the credibility of the witnesses and the weight to be given to the testimony. There was evidence upon which the verdict can rest, and we will not disturb it for this reason.

The charge of the court has been criticised, but there is only one objection which we deem it necessary to notice.

The deceased was a widower, with a family of several children. There was testimony tending to show that he was kind to them and provided well for them. In charging the jury upon the measure of damages his Honor instructed them as follows: "Actual damages consist of the mental and bodily sufferings of the deceased, his loss of time, and necessary expenses immediately resulting to the deceased from the personal injuries, and also the pecuniary loss his death has caused his children, if any," etc.

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In all other respects we think the charge is correct, and the question is, does the above instruction contain reversible error?

The action is predicated upon sec. 2291 and following sections of the Code. These sections have been several times construed by this court, but the decisions have not been uniform. The later and better construction is, that the actions given by these sections for the benefit of the widow and next of kin of a person whose death has been caused by the wrongful act, etc., of another, being the same action that accrued to, and could have been prosecuted by him in the event death had not ensued from the injury, no other element of damages can enter into or constitute a part of the recovery than such as were sustained by the deceased himself, and for which he could have recovered had he lived and prosecuted the action. And hence loss or injuries to the children or next of kin occasioned by his death, can constitute no part of the cause of action or element of the plaintiff's right of recovery. See *Trafford v. Adams Express Co.*, 8 Lea, 96, where the cases are carefully reviewed and the principle here stated enunciated. And this decision has been steadily followed since it was announced: *N., C. & St. L. R. R. Co. v. Smith*, 9 Lea, 470, and several unreported cases during the last term at Nashville. While a number of previous decisions had given apparent sanction to the rule announced by his Honor in the above instruction, and while upon the principle of *stare decisis*, it might have been better not

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to have disturbed these former decisions, yet there can be no doubt but the present construction is the correct one; and the principle upon which it is based had been announced long before in the case of *Fowlkes Adams v. N. & D. R. R. Co*, 9 Hum., 829.

Our attention has been called to a recent act of the Legislature, passed March 26, 1883, which provides that these sections be so amended that damages resulting to the parties for whose use and benefit the right of action survives, from the death consequent upon the injuries received, shall be recoverable in such action, and which is the same provision in substance as was embraced in the former decisions referred to. And it is now insisted that inasmuch as the legislative will has thus been expressed in regard to the principle we should give to this act, a sort of persuasive force as to the proper construction to be placed upon the sections of the Code above referred to, and again return to the previous construction by conforming our decisions to this recent act, or else give it a retroactive force by applying its provisions as well to cases that existed prior to its passage as those that occur under it. That this cannot be done, is, we think, too plain for argument.

By art. 1, sec. 20, of the Constitution of this State, "no retrospective law, or law impairing the obligation of contracts, shall be made."

By the law governing the rights of the parties at the time the cause of action alleged in this case accrued, the loss or injury to his children by the death of the deceased, constitute no element of

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damages for which they, or the plaintiff for them, had any right of recovery. The act in question constitutes a new or additional cause of action. The rights of the parties were fixed under the law as it existed at the time of the injury complained of, and any law which undertook to change those rights would be retrospective and void, as it would be a matter which affected the right and not merely the remedy, as has been insisted in argument.

For this error in the charge the judgment of the circuit court must be reversed and a new trial awarded.

LUCINDA C. SIGLER v. R. M. VAUGHN *et al.*

CHANCERY PLEADINGS AND PRACTICE. *Overruling demurrer. Appeal.*

A chancellor in his discretion may allow an appeal from a decree overruling a demurrer. Whatever may be the inconveniences, the statute is so written, and will not be evaded by construction.

FROM SHELBY.

Appeal from the Chancery Court at Memphis. W.
W. McDOWELL, Ch.

W. M. RANDOLPH for complainant.

ESTES & ELLIOTT, CRAFT & COOPER, R. J. MORGAN and HUMES & POSTON for defendants.

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FREEMAN, J., delivered the opinion of the court.

A motion is made to dismiss^u the appeals of defendants, Schobel, Tucker and wife, and Liddon and wife.

In the case of Schobel,^u his demurrer was sustained in part, but overruled as to the last point, with leave to rely on it in his answer at hearing. From this ruling, overruling the demurrer, he has appealed.

He is sued as surety on an administration bond, and the point made against him on this particular part of the case is, that on petition of former sureties of Cash, administrator of Isaac Bolton, a new bond in the sum of \$65,000 was required to be given for his administration, and Schobel was one of the sureties, the suit being by the widow of Bolton, who had dissented from his will and married Sigler. The motion must be allowed as to Schobel; his demurrer, while in form and for the present disregarded, is still permitted him, and he stands on it in the court below. Such a case is not within the Code on this subject: 6 Lea, 650.

The case of the other appellants is, that they are sued as devisees and legatees of John Harding, a surety on Cash's bond for administration of Bolton's estate. Harding is shown by the bill to have died, and his executrix qualified, and entered on her duties in November, 1871, and the estate claimed to have been wound up and the executrix discharged July, 1875. This suit was brought July, 1880, nearly nine years after probate of will and letters testamentary.

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The demurrer insists that no suit had ever been brought against the personal representatives of Harding, and none could have been brought against them as legatees and devisees without this, and that personal assets came to the hands of the executor, together with statute of limitations.

These defenses, if sustained, would relieve these parties of all liability in any event. The chancellor overruled demurrer based on them, and the question is, whether this appeal can be allowed till the other parties have been sued to final decree. It is clear the questions presented on this demurrer, if sustained, dismiss these defendants from the case, and are a complete defense to the case against them. They are not joint parties to the bonds, on which the liability is sought to be enforced, and their defenses are independent of the defenses to be made by others in the suit. No reason is seen why the suit may not take its regular progress, while this demurrer is being disposed of by this court.

By sec. 3157, Code, the chancellor or circuit judge may, in his discretion, allow an appeal from his decree in equity causes, determining the principles involved, and ordering an account, etc., or he may allow such appeal on overruling a demurrer, or he may allow *any* party to appeal from a decree which settles *his* right, although the case may not be disposed of as to others.

However we may construe the latter clause, whether as regarding a final decree on the merits, or a settlement of rights at any other stage, yet as to the right

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of the chancellor to allow an appeal from overruling a demurrer, there is no qualification or limitation whatever. It is the right of the party, whose demurrer has been overruled, to ask, and within the discretion of the chancellor to grant the appeal. Whatever may be the inconveniences, the statute is so written, and there is, as we think, no need to evade it by construction.

We have held nothing to the contrary of this in the cases of *Grotenkemper v. Carver*, 4 Lea, 380, or *Hunter v. Gardenhire*, '10 Lea, 87. Both of these cases were appeals by complainants where demurrers were sustained, and not demurrers overruled, under the section of the Code cited. In the first case, the point suggested by the member of the court delivering the opinion, that the cause would still remain in court after dismissal by demurrer, and throwing a doubt on the right of appeal till the whole case is disposed of, was not adjudged at all. In the second case it was only adjudged that complainant could not appeal of right because the decree was not a final decree, settling the right on demurrer as to only a part of defendants. To this extent the cases are authority, no further. This being so, it is not seen that any rule of law will be contravened by allowing these appeals, and the statute will have its legitimate operation. It makes no exception, and, on careful reflection, we see no imperative need to make any by construction in this case. If inconveniences arise the remedy is with the Legislature, not the courts.

It is true we held, we would control an improper

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exercise of discretion by the chancellor in allowing an appeal on overruling a demurrer, in the case of *Boyd, Mosely & Co. v. Hunt*, 7 Lea, 82, but we can see no reason to say the discretion was not properly exercised in this case. In that case the necessary parties for settlement of the question involved in the case were not before the court at all.

We cannot construe the section of the Code to mean that a party can be allowed to appeal at discretion of the chancellor on overruling a demurrer, only after a final decree on the merits, or when all the other parties have demurred and had demurrers overruled and appeal, without repealing the statute or interpolating language that defeats its purpose.

As to the first case, a party could always appeal on final decree and get the benefit of his demurrer. In the other case, the right given is made to depend on the action of another, who may have no ground for demurrer, or an independent defense which he chooses to rely on.

Taylor v. French.

OLIVIA TAYLOR *et al.* v. JAMES H. FRENCH *et al.*

PLEADINGS AND PRACTICE. *Severance.* Where a right to a joint action is given by statute, the courts have no discretion to grant a severance.

FROM SHELBY.

Appeal in error from the Circuit Court of Shelby county. J. O. PIERCE, J.

GREER & ADAMS and HARRIS & TURLEY for Swink.

ESTES & ELLETT for HARBERT.

TURNEY, J., delivered the opinion of the court.

This suit was commenced in April, 1872, against C. C. Partee and B. F. Harbert, of the firm of Partee & Harbert, and Hiram Partee, John Harbert and James H. French, on two notes of \$6,000 each, dated June, 1870, payable twelve months after date, one to the order of H. Partee and John Harbert, both signed Partee & Harbert, both endorsed by Hiram Partee, John Harbert and James H. French, the only difference is, that on one Hiram Partee appears as first endorser, and on the other, John Harbert.

The case was in this court at a former term, the judgment reversed and the cause remanded.

On the calling of the cause for trial after its remandment, the administrator of John Harbert moved

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for severance, stating as grounds, that the interest of the estate of his intestate demanded it, that he had been unable to obtain a trial because of delay produced by the death of a confederate, J. H. French, and the seeming difficulties encountered in having the suit revived against his representatives. That by reason of the connection that J. H. French had with the borrowing of the money for which the notes were given and his relationship to the plaintiffs, the defense of the suit by affiant is embarrassed, while the defense is a joint one. That J. H. French and John Harbert are both witnesses in the case, and it would be better that the defense should be separate.

The order for severance was made over the objection of plaintiff. This was error. The right to the joint action is given by statute and courts have no discretion to disturb it.

After the severance this branch of the case was tried under the style of Geo. W. Swink, administrator, and others, against C. W. Harbert, administrator of John Harbert.

The pleadings present three alternative theories, upon which it is insisted the parties appearing as endorsers should be held liable, viz, as endorsers, or guarantors or as sureties. On the trial, evidence was offered tending to show that after the maturing of the notes and failure of the makers to pay, the defendant promised to pay. The testimony was rejected by the court because there was no count in the declaration excusing the want of demand and notice. Thereupon plaintiff moved for leave to file such count, which was refused by the

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court. The rule is, that when it appears the justice of the case requires it, the court may allow amendments to meet the requirement. *Prima facie* a case for amendment was made over it and should have been allowed.

Several depositions were rejected for the reasons stated. An examination of the record shows that these depositions contained evidence tending to show a guarantee of payment or an original suretyship and not merely accommodation endorsement. The objection being to the entire depositions and the ruling of the court as comprehensive, make error.

The rulings of the court took the case entirely from the jury and left it only the formal duty of rendering a verdict for the defendant.

The judgment is reversed, the order of severance vacated and the cause reinstated for trial as originally intended or subsequently revived.

11L 138
116 194

W. S. CURRIE and Wife, ALICE CURRIE, v. F. B. KERR.

CONVEYANCE. *Married women. Certificate.* The certificate of acknowledgment of a married woman to a conveyance which omits "and for the purposes therein expressed," is defective and vitiates the validity of the conveyance.

FROM HAYWOOD.

Appeal from the Chancery Court at Brownsville. H.
J. LIVINGSTON, Ch.

Currie v. Kerr.

A. D. BRIGHT for complainants.

BENJ. J. LEA for defendant.

COOKE, Sp. J., delivered the opinion of the court.

This was a bill filed to restrain the sale of the homestead interest of complainant, Alice Currie, in a house and lot, under a deed of trust executed by the complainants to the respondent, upon the grounds that the signature of complainant Alice was obtained to said deed by false and fraudulent representations on part of the commissioner who procured her signature to the deed and took her privy examination, as to the contents and character of the instrument she was requested to sign; and also because the certificate of her privy examination and acknowledgment is defective.

It is not perhaps clearly shown that any actual fraud or misrepresentation was practiced upon the complainant Alice to induce her to sign the deed, but the preponderance of the testimony does show that she was misled rather by inadvertance or design as to the character of the instrument she was signing, and the proof does clearly show that she neither read the deed nor was it read to her, and that she was not examined by the officer touching her knowledge of its contents or effect. It is in proof both by her own testimony, which is very pointed and explicit, as well as that of another witness who was present, that she said at the time she signed this deed that she never would sign away her homestead, and she states positively that the paper she signed was represented to her by the com-

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missioner who took her examination and who brought the deed to her to sign, that it was to perfect the right to a tract of land her husband had sometime before that, sold to a man by the name of Moore, and that she knew said commissioner well and had full confidence in him, and trusting to his representation she signed the same without reading it, and believing it was a paper perfecting the title to the land sold to Moore.

The commissioner, while he testifies very positively that he did not practice any fraud or deception upon her, or tell her that the paper was a deed to the land sold to Moore, or for the purpose of perfecting the right to that land, yet he does not pretend to remember a word that was said or an occurrence that took place upon the occasion, but says his memory is not good, and evidently bases his denial alone upon the fact that he had no interest in the matter, or motive to so represent it to her, and that it would have been false if he had done so. And also bases a statement that she acknowledged the deed in the manner stated in his certificate, alone upon the fact that he made the certificate and would not have made it if she had not done so. There are facts in the record aside from his very prompt admission, showing that the memory of this witness is not by any means good.

But whether the complainants would be entitled to relief alone on this ground, it is not necessary in the view we take of the case to determine. Section 2076 of the Code, among other things, contains the following provisions: "The officer or court before whom the

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execution of such deed or instrument is acknowledged or proved, shall examine the wife privily and apart from her husband, touching her voluntary execution of the same, *and her knowledge of its contents and effect.*"

* * * And if such officer is satisfied *she fully understands the same*, he shall in addition to the certificate of probate or acknowledgment above prescribed; also put on the back of the deed, or annex to it, the following certificate:

"And — — —, wife of the said — — —, having appeared before me privately and apart from her husband, the said — — —, acknowledged 'the execution of the said deed to have been done by her, freely, voluntarily and understandingly, without compulsion or constraint from her said husband, and for the purposes therein expressed. Witness, etc."

The commissioner, when he comes to make this certificate, follows the prescribed form substantially until he comes to the words "*and for the purposes therein expressed,*" which are wholly omitted from the certificate, and no words of any description substituted in their stead.

By section 2080 of the Code, it is provided "that the *unintentional* omission by the clerk of any words in a certificate of acknowledgment, or probate of any deed or other instrument, shall in no wise vitiate the validity of such deed, but the same shall be good and valid to all intents and purposes, if the substance of the authentication required by law is in said certificate."

The question to be determined is, does the certifi-

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cate of the commissioner to the deed in question contain the substance of the authentication required by sec. 2076 of the Code, or, in other words, does the certificate in question contain precisely the same substance and meaning without the omitted words "and for the purposes therein expressed," as it would with those words inserted?

"It is settled by our decisions, and seems to be the principle upon which most of them rest, that a set form being prescribed, all implication as to every material fact made necessary by the law is entirely excluded: 9 Baxt., 294; 1 Cold., 225.

"It was the intention of the Legislature to make the execution of a deed by a married woman one of the most solemn acts known to the law; and the clerk in taking the privy examination must not only be satisfied that she understands the nature of the act, but that she fully understands it, and as evidence that he has performed his duty, he must put on the back of the record, or annex to it, the *prescribed* certificate."

The execution of the deed to pass the married woman's estate and title is imperfect and incomplete until the official act of the clerk or other officer is made perfect and complete by meeting in letter and spirit every requirement of the statute. "A conveyance by a married woman of her estate must be in strict accordance with the letter of the statute," and "the statute must be construed strictly": *Rhea v. Isley*, 1 Leg. Rep., 292.

In the case of *Ellett v. Richardson & Co.*, 9 Baxt., 295, the words "and having been examined" were

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omitted from the certificate, and the court say this is not a mere verbal omission, and that it is not included in the fact of the acknowledgment of the execution of the instrument.

In view of the facts of this case that the complainant did not read the deed, nor was it read to her, or the contents made known to her, and that she was not examined touching her *knowledge of the contents and effect*, we can see that the words omitted, "and for the purposes therein expressed," could give an additional signification and an extended and more comprehensive meaning to the certificate than it has without them; and as the record shows satisfactorily that in point of fact she did not know what were the purposes expressed in the deed, and as said commissioner neither explained them to her nor examined her touching her knowledge of them, this portion of the required certificate might well have been omitted by design.

In the case of *Davis v. Bogle*, 11 Heis., 317, it was decided that the words in a certificate "for the purposes herein *specified*," were equivalent to the words prescribed in the statute, "for the purposes therein *contained*," as the word "specified" was quite as comprehensive as the word "contained," thus in effect holding that these words, or their equivalents, were essential to the validity of the certificate, and we hold to that opinion. It follows, therefore, that the certificate is defective, and the complainant has not parted with her right of homestead in the premises in question.

The chancellor so held, and we affirm his decree with costs.

Fowlkes v. Heirs and Creditors of P. H. Bowers.

J. M. FOWLKES, Adm'r. v. Heirs and creditors of P.
H. BOWERS, deceased.

ADMINISTRATION. *Insolvent estate. Partnership. Individual and joint creditors. Priority.* In the administration of an insolvent estate the separate creditors are entitled to priority of satisfaction out of the individual property, and the joint creditors of a firm of which he is a member out of the partnership property; but if, after the dissolution of the firm, the deceased had executed as an individual the note of the firm given in liquidation of a partnership debt, the holder of the note is entitled to file it against the estate, and participate in the distribution of the individual assets.

FROM FAYETTE.

Appeal from the Chancery Court at Somerville. H.
J. LIVINGSTON, Ch.

H. C. MOORMAN for complainant.

JONES & GALLAWAY, STAINBACK & RIDDICK, J.
P. EDMUNDSON, H. P. HOBSON and E. R. SCRUGGS
for defendants.

COOPER, J., delivered the opinion of the court.

Bill by the complainant as administrator of the estate of P. H. Bowers, deceased, to administer the estate as insolvent. W. B. Galbreath & Co. were made defendants and filed several claims against the estate in the form of negotiable paper. The chancellor was of opinion, and so decreed, that the intestate was only liable on the paper produced as one of the firm of

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Bowers & Holloway, and that Galbreath & Co. were not entitled to participate in the distribution of the individual assets of the intestate until after the individual creditors were paid. Galbreath & Co. appealed.

The intestate and J. J. Holloway had been partners in business under the style of Bowers & Holloway. The firm dissolved on April 21, 1877. Two of the claims filed by Galbreath & Co. were notes for about \$3,000 each, one dated February 10, 1877, and the other March 21, 1877, both signed Bowers & Holloway, per P. H. Bowers. Two other claims were also promissory notes, one dated May 3, 1877, for \$7,866.68, and the other dated May 22, 1877, for \$5,002.39, both signed Bowers & Holloway, in liquidation, and also by P. H. Bowers and J. J. Holloway, as individuals. A fifth claim was in the shape of a bill of exchange, dated May 22, 1877, drawn and accepted by W. B. Galbreath & Co., signed like the last two notes, by the firm in liquidation, and by the individual members. The answer of Galbreath & Co. states that the deceased was indebted to them in the several claims and accounts specified "as one of the firm of Bowers & Holloway." It also appeared that these claims had been secured by deeds of trust on real estate of the firm and of its individual members, from the sales of which realty Galbreath & Co. had realized over \$9,000. By the statement of Galbreath & Co., and also by the report of the master in the cause, it appears that the money thus received and a balance of account in favor of Bowers & Holloway on the books of Galbreath & Co., were credited upon

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the aggregate of the above claims, leaving the amount of over \$10,000 still due and unpaid. The estate of Bowers was insolvent.

It is conceded that the chancellor's decree is correct as to the two notes executed in the name of the firm during the existence of the partnership. These notes are exclusively partnership debts, the liability of each member as an individual being only such as is created by the partnership relation. This court, influenced more perhaps by its equity than its logical accuracy, has adopted the rule, in the administration of insolvent estates, that the separate creditors of the deceased are entitled to priority of satisfaction out of his individual property, and the joint creditors of a firm of which he was a member out of the partnership property: *Jackson Ins. Co. v. Partee*, 9 Heis., 296; *Richardson v. Richardson*, 1 Leg. Rep., 99; *Pennington v. Bell*, 4 Sneed, 200. The doubt is as to the chancellor's rulings on the other claims.

These claims are in the form of negotiable securities executed after the dissolution of the firm both in the firm name and in the names of the partners as individuals. The liabilities for which these securities were given had no doubt been created by the firm, and were partnership debts. The partnership liability was continued by the use of the firm name with the assent of both partners: *Hatton v. Stewart*, 2 Lea, 233. Without such assent, the signature of the firm would only have bound the member of the firm who wrote it, and the debt would have become his individual debt: *Martin v. Kirk*, 2 Hum., 529. But the negotiable

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instruments in question were also signed by each member of the firm as an individual. This he might do of course, his liability for the original debt and the extension of time of payment constituting a sufficient consideration. The legal effect was not only to ratify the use of the firm name with a view to keep alive the partnership obligation, but to make the particular debt the debt of the signer as an individual. There is no proof to show, even if the proof were admissible, that the individual signatures were not intended to be, what in law they plainly import, personal obligations. Thereafter, the appellants were not only joint creditors of the firm, but separate creditors of each member of the firm as individuals. If a person execute a valid negotiable security as an individual he and his property become liable accordingly, and the result cannot be changed because a partnership of which he is a member also executes the instrument. The legal consequences of the act was necessarily the same in either case.

The decree below must be reversed, and the balance of the claim of the appellants allowed as a proper claim against the estate of the intestate, and the cause remanded for further proceedings. The costs of this court will be paid out of the assets of the estate.

TURNEY, J., dissents.

COOPER, J., upon the petition to rehear, delivered the following (dissenting) opinion: (?)

In support of the petition for rehearing in this case, a full and able argument is submitted upon pre-

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cisely the same grounds as those assumed in the original argument. The contention is, as before, that the only effect of the renewal of the negotiable securities of the form in their new form was to continue the firm liability. And the argument is thus epitomized at its close: 1. That partnership debts cannot be converted into individual debts, or into partnership and individual debts, without showing both a sufficient consideration, and the mutual and deliberate consent of both parties to the conversion. 2. That the form of the two notes and the draft in the record affords no evidence of any interest to convert the debts evidenced thereby, because their firm consists equally as well with the theory of non-conversion as it does with that of conversion. The conclusion of the court was that by the new securities the old liability of the firm was continued, and the members of the firm became individually liable. The positions of the learned counsel were squarely, although briefly met. The argument now made, and the authorities now cited only bear on those positions. But the first position merely means that a creditor of a partnership cannot be deprived of his rights against the partnership except by his consent deliberately given. It is not inconsistent with the right of the creditors to add to the liability of the firm the individual liability of the members of the firm. And the second position is, we think, not a logical sequence of the premises, for it requires the court to treat the individual liability as if it had never been assumed. The very object of the change of form must have been to give the creditors the benefit of

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the legal consequences of the new form. "And why," to use the language of Judge Story, "should any court deprive the creditor of the very benefit which the debtors had stipulated to give him, or restrain him from using all his rights?" Sto. on Part., sec. 389. The only American authorities adduced in the analogous case of bankruptcy decide that a creditor, who holds a note signed by a firm and an individual member, may prove the claim against the assets of the firm, and also against the estate of the partner: *Emery v. Canal Nat. Bank*, 7 Bank. Reg., 217; *Mead v. National Bank*, 7 Am. Law Reg., 818; *Farman's Case*, 6 Boston Law Rep., 21; *In re Bigelow*, 2 Bank. Reg., 371. And even if the creditors were forced to elect under the English doctrine, they have elected in this case to proceed against the estate of the individual member. Rehearing refused.

OLIVER, FINNIE & CO. v. P. R. ATHEY, Garnishee.

GARNISHMENT. *Deputy sheriff. Fees or salary.* The salary of a deputy sheriff who is paid a compensation for his services instead of fees allowed by law, is not subject to garnishment. His services are necessary in carrying on the machinery of government, and the exemption is on the grounds of public policy.

FROM SHELBY.

Appeal in error from the Circuit Court of Shelby county. J. O. PIERCE, J.

Oliver, Finnie & Co. v. Athey.

H. F. DIX and W. M. RANDOLPH for Oliver, Finnie & Co.

J. J. DUBOSE for Athey.

COOKE, Sp. J., delivered the opinion of the court.

The plaintiffs having a judgment against one Stewart, execution was issued thereon and garnishment served upon the defendant Athey, requiring him to answer what he was indebted to Stewart, etc. The answer of the garnishee stated that he was sheriff of Shelby county, that Stewart was in his employ as deputy sheriff, and was and still is one of his deputies. His wages are \$50 per month. When the garnishment was served he was indebted to said Stewart upon said salary as his compensation as deputy sheriff \$20.15. He serves in the chancery court as such deputy by his appointment.

Upon this answer, the justice before whom it was made, discharged the garnishee and the plaintiffs appealed to the circuit court, when the judgment was again in favor of the garnishee, and the plaintiffs appealed to this court.

This case, we think, is clearly within the principle described in the case of *Bank v. Dibrell*, 3 Sneed, 379. A deputy sheriff is an officer provided for by law, and equally within its protection with any other. His services are necessary in carrying on the machinery of government, in one of its departments, and his compensation, although received by way of a fixed salary instead of the fees allowed by law for specific services, or a part of them, is in lieu of the perqui-

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sites to which he would otherwise be entitled, and is equally necessary for his support, and the reason of the exemption on account of public policy, is the same in the one case as the other.

There is no error in the record, and the judgment will be affirmed.

11L 151
16L 440
1pi 172

NORA B. HART and Husband v. BIANCA CZAPSKI *et al.*

CHANCERY COURT JURISDICTION. *Guardian and Ward. Non-residents.* The chancery court of the district in which a guardian has been appointed for infants, has jurisdiction upon the application of the guardian, to break into the principal of the estate of the infants for their benefit, where the estate whether consisting of realty or personalty, is placed under the control of the court, although the guardian and wards are non-residents of the State, and the latter made defendants by publication.

FROM SHELBY.

Appeal from the Chancery Court at Memphis. W.
W. McDOWELL, Ch.

RANDOLPH & MCHENRY for complainants.

H. C. WARRINER for defendants.

COOPER, J., delivered the opinion of the court.

This bill, filed in the chancery court of Shelby

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county, was dismissed by the chancellor on motion, and complainants appealed.

Louis Czapski died in 1878 in Shelby county, of which county he was a resident citizen, leaving a widow, the complainant, Nora B., who has since intermarried with her co-complainant, A. W. Hart, and four children. These children are defendants to the bill, and their ages at the filing of the bill ranged from four to thirteen years. The complainant, Nora B., was appointed by the probate court of Shelby county, the guardian of the children. The only estate of the infants consists of \$5,000 invested in the first mortgage bonds of the Mississippi & Tennessee Railroad Company, a corporation of this State. These bonds have been since they became the property of the wards, and are now in the custody and under the control of the defendant, the Union and Planters Bank, a corporation of this State at Memphis. The income from these bonds is only \$400, and insufficient, the bill alleges, for the support and education of the children. It is further alleged that the pecuniary condition of the complainants is not such as to enable them to supply the deficiency out of their own means. The object of the bill is to obtain the sanction of the court to a sale of one of the bonds for \$1,000, and the appropriation of the proceeds to the maintenance and education of the children. The bill states that the complainants and the children are non-residents of the State, and residents of Rock county in the State of Iowa. And it asks that the children be made defendants by publication. The bill is sworn to.

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Publication having been made, the chancellor appointed a guardian *ad litem* for the infants. The guardian thereupon moved the court to dismiss the bill because it shows that the regular guardian and the wards are non-residents of the State, and, the suit relating to personal property, does not give the court jurisdiction of such non-resident defendants.

The court of chancery, it is conceded, has power to break into the principal of an infant's estate, or to authorize the guardian to do so, where the fund is so small that the interest will not afford the means of a competent maintenance and education to the infant: *Beeler v. Dunn*, 3 Head, 88. It is equally conceded that the non-residence of the guardian and wards would be no obstacle to the relief sought if the court has in other respects acquired jurisdiction: *McClelland v. McClelland*, 7 Baxt., 210; *Hickman v. Dudley*, 2 Lea, 375; *Stephens v. Jones*, 1 M. & K., 627. The argument in support of the demurrer is that non-resident parties cannot be brought into court by publication unless there is something in the case to give the court jurisdiction independent of the publication. For, it is pertinently said, if it were otherwise, the present suit might be brought in any county in the State. And the question therefore is whether there is anything to confer upon the chancery court of Shelby county the requisite jurisdiction.

The court of chancery in this State acts ordinarily *in personam*, and suit may be instituted wherever a material defendant is found, unless otherwise prescribed by law: Code, sec. 4305. But the Code does pro-

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vide for the local jurisdiction of the court when the parties cannot be found within the limits of the judicial district. Among other things it provides that bills against non-residents, or persons whose names and residences are unknown, may be filed in the district in which the cause of action arose, or the act on which the suit is predicated was to be performed, or in which the subject of the suit or any material part thereof is: Code, sec. 4311, sub-sec. 4. The appointment of a general guardian of an infant by any of the probate courts of this State, and the qualification of the guardian by the execution of a bond and otherwise as prescribed by law, creates a relation between the guardian and ward, and obligations on the part of the guardian to the ward upon which causes of action necessarily arise, and under which acts and duties are to be performed. The court of chancery of the district of appointment would, by virtue of the statute, have jurisdiction of such cases. It is the duty of the guardian to appropriate the estate of the ward to his maintenance and education. The ward may clearly enforce the duty by action against the guardian, and the guardian may just as clearly administer the assets of the ward within the jurisdiction of the court under the orders of the court. The non-residency of the parties, as we have seen, offers no obstacle to the exercise of the jurisdiction. It can make no difference whether the property of the ward, sought to be administered, is real or personal, nor whether it has always been within the local jurisdiction of the court, or is brought there for the express purpose of confer-

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ring jurisdiction. All that is material is that it is the property of the ward, and that it should be used for his benefit.

The decree must be reversed and the cause remanded for further proceedings. The costs of this court will be paid by the complainant, and allowed as a credit in the settlement of the guardian.

F. L. MILLER v. BROWN & FORSYTH.

EXEMPTION. *Homestead. Improvements. Mechanic's lien.* Real estate in the occupancy of the head of a family is not exempt from sale for the satisfaction of a debt contracted for improvement made thereon, although the creditor may have lost his lien as a mechanic for the debt.

FROM GIBSON.

Appeal from the Chancery Court at Humboldt. JOHN SOMERS, Ch.

W. I. MCFARLAND for complainant.

H. T. JOHNSON & BRO. for defendant.

COOPER, J., delivered the opinion of the court.

The defendants having built a house on the land of complainant, filed a bill to enforce the mechanic's

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lien, and recovered a judgment against the complainant for \$591.15, and a decree for the sale of the land in satisfaction thereof. At the sale the defendants bought the land for \$100, and the report of sale was confirmed, and title vested in them subject to the complainant's right of redemption. The original bill in this cause was filed to redeem the land upon an alleged tender in time of the amount of the bid with interest and costs. The defendants answered, filing their answer as a cross-bill. The complainant appealed from the decree of the chancellor overruling his demurrer to the cross-bill.

The substance of the cross-bill is that the land was bid off by the defendants at \$100 upon the special request of the complainant to diminish the costs, and upon his agreement to pay the entire debt of the defendants in order to redeem. It is further insisted that as the defendants had the legal title to the land, and a judgment against complainant for the unpaid balance of their debt, the court would not deprive them of the title without compelling the complainant to do equity by the payment of their debt in full. The learned counsel of the complainant concedes that his client would not be permitted to redeem under these circumstances without paying the whole debt if the land was subject to the satisfaction of the debt by execution, for the obvious reason that the court would do at once what might be done circuitously by a sale of the land by virtue of the execution as soon as it was redeemed: *Cooley v. Weeks*, 10 Yer., 141. And it is clear that the defendants might, in the case sup-

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posed, reach the equity of the defendant in the land for the satisfaction of the judgment, the complainant being, as alleged in the cross-bill, insolvent. But the complainant insists that the rule as conceded by him does not apply where the property is exempt from execution, and that the land in controversy is thus exempt, he being entitled to a homestead right. It is, perhaps, a sufficient answer to this position to say that the cross-bill does not show the existence of the homestead right, or state facts from which its existence may be inferred. It does admit that the complainant is in possession of the land, but not that he is the head of a family, or entitled to homestead. The demurrer is therefore to this extent a speaking demurrer. But the true answer is that the land is not exempt from the execution even if the complainant has a homestead right, for the judgment is for the cost of the building erected on the land by the defendants, and the statute expressly provides that the real estate in the occupancy of the head of the family shall not be exempt from sale for the satisfaction of any debt or liability "contracted for improvements made thereon": Code, sec. 2114 *a*. The lien of the mechanic may be lost, but the debt for the improvement remains. It has been so held in the analogous case of a vendor's lien: *Bentley v. Jordan*, 3 Lea, 353, 358. The homestead is not exempt from the debt.

Affirm the decree with costs, and remand.

Read v. Watkins.

JAS. D. READ, Ex'r of Chas. L. Read, deceased, v. NAT.
WATKINS and WIFE *et al.*

WILLS. *Construction.* Ordinary words conveying the absolute title, will not, without superadded words giving unlimited power of disposition, defeat an executory devise.

FROM HAYWOOD.

Appeal from the Chancery Court at Brownsville.
H. J. LIVINGSTON, Ch.

H. W. BOND, A. T. McNEAL and McCORRY &
BOND for complainants.

R. W. HAYWOOD and SMITH & COLLIER for de-
fendants.

DEADERICK, C. J., delivered the opinion of the court.

In June, 1877, complainant filed this bill in the chancery court at Brownsville, for the purpose of having a construction of the will of his testator.

Testator departed this life in December, 1869, leaving a widow and eleven children, and a large real and personal estate. He had been twice married, and left living children, or their representatives, by each of his wives. He made and published his will in March, 1866, and added a codicil thereto, November 18, 1869. His widow died a few years after testator's death.

Read v. Watkins.

The first clause of the will is as follows: "I loan to my beloved wife, Elizabeth M. Read, during her natural life, the tract of land on which I now reside, containing about twelve hundred acres, and I give and bequeath to her all my household and kitchen furniture, plantation tools and implements, carpenter's tools, and all the stock of every description, such as horses, mules, hogs, cattle and sheep, and all the wagons, carts, pleasure carriages, rockaways and buggy; all the corn, wheat, fodder, oats, rye, flour, meal, etc., not heretofore disposed of to J. D. & J. H. Read."

The second clause is as follows: "I give and bequeath to my said wife, after the payment of my just debts (including any that I have, or may execute to any of my children), all my crops of cotton on hand, except the one-fifth of the crop of 1864, and the one-sixth of the crop of 1865, which belongs to my son, J. H. Read. I also give and bequeath to my beloved wife all moneys that I may have on hand, all my bonds or notes and moneys on deposit, if any."

Clauses three and four devise lands to his children.

The fifth clause provides: "After the death of my beloved wife, and after all her debts are paid, I devise, will and direct that the property, real and personal, of which she may die seized and possessed, including any moneys she may leave, shall be equally divided among all my children and representatives of my deceased children, to-wit, * * (naming them), the children of my deceased children, to represent their parents and take the share their parents would have taken if living."

Read v. Watkins.

The sixth clause provides that should his wife give to any of his children, any part of the money or personal property he had given to her, such child or children should account for the same on the final division of his estate, as though made by himself. "So that part I may leave my wife may be equally divided among my said children."

The seventh clause directs his executor not to have a public sale of any property not disposed of by the will, but this request was not to extend to any property left by his wife.

The eighth clause and last appoints his executor, Jas. D. Read, the complainant.

The codicil confirms a conveyance of a tract of land made to his daughter by him, and which was purchased by him at sheriff's sale as the property of her husband, and she is to be charged for it \$1.800, to be deducted from her interest in his estate after his death and the death of his wife, when his estate is divided amongst his children.

The question submitted for determination of the chancellor, was whether the widow took under the will a life estate only in the personal property.

The chancellor held that she took under the first and second clauses of the will the absolute right to the personalty therein bequeathed her, and the defendants, children of the first marriage have appealed to this court.

In the case of *Smith, Trustee, v. Bell and Wife*, it was held that where the bequest was "to and for her own use and disposal absolutely, and after her

Read *v. Watkins*.

decease to be for the use of Jesse Goodwin," that the wife of testator, the first taker, took an absolute estate, with unqualified power of disposition, which defeated the executory devise to said Jesse Goodwin: M. & Y., 303; 10 Yer., 290; 1 Cold., 227.

But in *Brown v. Hunt*, 12 Heis., 409, it is held "the power of disposition inconsistent with the devise over must be one given by the will, and not a mere incident at common law, to the estate given to the first taker": 5 Hum., 503; 1 Swan, 185.

So that the ordinary words conveying the absolute title, will not, without superadded words giving unlimited power of disposition, defeat an executory devise.

Testator, in the fifth clause of his will, directs that all the property, real and personal, of which his wife may die possessed, including any money she may leave, shall be equally divided amongst all his children.

And the sixth clause provides that if his wife should give to any of his children any part of the property or money he had given her, it should be accounted for on the settlement of his estate.

Clause sixth does not contain an unlimited power of disposition of the property testator had given his wife, but may more properly be regarded as a recognition of a power to make advancements to his children, and such a limited or special power, unless fully executed, would not defeat the limitation over.

In this will there is no such unqualified power of disposition, and the result is that the decree of the chancellor is erroneous, and must be reversed, and a decree entered here in conformity to this opinion, and

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the cause will be remanded for further proceedings. The costs of this court will be paid by the executor, Jas. D. Read, executor of Chas. L. Read, deceased, out of the assets in his hands.

McGOWAN, Trustee, v. TAXING DISTRICT.

TRUSTEE. *Compensation. Sale of land.* The trustee of Shelby county is entitled to a fee of fifty cents upon each tract of land sold by him and bought by the Treasurer for delinquent taxes, levied for the Taxing District of Memphis.

FROM SHELBY.

Appeal in error from the Circuit Court of Shelby county. J. O. PIERCE, J.

GANTT & PATTERSON for McGowan.

C. W. HEISKELL for Taxing District.

FREEMAN, J., delivered the opinion of the court.

This agreed case raises the question whether the trustee of Shelby county is entitled to fifty cents for each lot or parcel of land sold by him and bought by Treasurer, for delinquent taxes levied in favor of or for use of the Taxing District of Memphis?

It is conceded that the trustee has properly discharged his duty by advertising and selling 1,976 tracts

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or lots for taxes assessed for benefit of the Taxing District.

By the act of 1881, sec. 59, the trustee is entitled to "compensation for his services in *receiving* and paying over to the rightful authorities all moneys received by him, commissions as therein specified, with a limit as to the amount to be received from this source."

By section 86 it is provided: "That the Comptroller of the Treasury shall issue his warrant for the fees of the trustee, clerk and printer, on all sales of land to the Treasurer of the State, said fees to be as follows: Trustee's fee fifty cents, printer's fee five dollars for notice required in sections 58 and 68, clerk's fee fifty cents for each separate tract, lot or parcel of land."

The claim of complainant is based on this section. We think the fifty cents is for each tract or lot sold, if applicable to sales made for the Taxing District, as such sales may continue for several days, as contemplated by law, and a compensation of only fifty cents for the entire sale, would be a mockery. Such was not the intention of the Legislature.

But the question of the right to this compensation for sales made for the Taxing District is insisted on the ground that by section 13 of the act creating the Taxing District, it is provided: "The county trustee shall, in addition to the compensation provided in chapter 91, section 10, page 132 of the acts of the General Assembly, passed March, 1875, receive for collecting and disbursing the revenue of said Taxing District, the sum of \$1,000 per annum." This sum

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has been paid the trustee, and it is claimed that the extra fee for sales of land is by this language excluded.

Section 10 referred to allows compensation by way of commissions on amount collected by him, and he was forbidden to receive any compensation except as provided by the act. And so we held in *State ex rel. Baber v. Nolan*, 8 Lea, 401, he was not entitled, under the act of 1879, amendatory of the above act to a fee of fifty cents for selling each tract of land, because there was no such fee expressly allowed by the act.

It is not denied that the trustee has properly sold this land, and is, by act of Extra Session of 1879, section 2, entitled to use the same means of compulsion of payment in the Taxing District as in the cases of collection of delinquent State and county taxes.

We cannot see how he can be excluded from the fee provided by the 86th section of the act of 1881. The land is sold by him for payment of taxes, is bought by the Treasurer of the State, and the fee fixed and affirmatively given is fifty cents for the service on each tract of land.

The \$1,000 allowed by act of 1879, "for collecting and disbursing the revenue of said Taxing District," in addition to compensation by way of commission allowed by act of 1875, cannot fairly be held to forbid the right to receive a compensation provided in express terms by the subsequent act of 1881. If intended to exclude the payment of this fee in the case of sales for use of the Taxing District, it was easy to say so, and this has not been done. There is no necessary

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antagonism between the two acts, the last provision is but an additional fee for a particular service that was not provided for by the act of 1875.

We therefore conclude, that for this particular service of the trustee, he is allowed the sum of fifty cents on each lot or tract of land sold by him in this case.

The judgment below is reversed and judgment here as indicated.

E. R. IRBY *et al.* v. W. E. IRBY *et al.*

1. CHANCERY PLEADINGS AND PRACTICE. *Sale of real estate. Value.*
The only test of the value of property at a forced sale is what it will bring.
2. SAME. *Same. Title.* When the sale of property is forced, the court has no power to give a bidder assurance of a good title, and proffer to bid on the terms of such assurance cannot be entertained.
3. SAME. *Same. Clerk and master. Terms of sale.* The master, in executing an order of sale, may demand an immediate compliance by a purchaser with the terms of sale, when he has reason to doubt the good faith of a bidder.
4. SAME. *Same. Biddings re-opened. Advance bid.* After the biddings at a master's sale have once been opened and a public resale had, the court may well, upon another offer of an advance of ten per cent, confirm the sale to the reported bidder with his consent at the new advance.

FROM SHELBY.

Appeal from the Chancery Court at Memphis. W.
W. McDOWELL, Ch.

Irby v. Irby.

W. M. RANDOLPH for complainants.

HUMES & POSTON for defendants.

COOPER, J., delivered the opinion of the court.

Bill filed November 24, 1873, by E. R. Irby as administratrix of the estate of E. Irby, deceased, against the heirs and creditors of the intestate, upon suggestion of insolvency, to sell the lands descended for the payment of debts. The present appeal is by the heirs from a decree confirming the sale of the lands. There is no question as to the propriety of the decree of sale. The only contest is whether the sale reported should have been confirmed.

A sale of the lands had once been made under the decrees of the court, which was set aside by the court, because, as the order states, it was impossible to locate or designate the lands. A new survey was ordered and made, and the court directed the land to be sold for one-third cash, and the balance of the purchase money in one and two years, the purchaser to give notes with good security, etc. This order was made on January 21, 1881. From this decree, which was only a renewal of the former decree of sale, no appeal could have been taken even with the consent of the court. But first one, and then another party appears to have asked for an appeal, which seems to have been granted, set aside, granted again, and again set aside as if his Honor desired to accommodate all parties as they severally applied to him. However, in the end, before the close of the term, all the orders granting

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appeals were set aside, and the prayers for appeal refused.

On March, 26, 1881, the clerk and master sold the land as ordered. At this sale Busby and Andrews purchased two lots at the price of \$391, and nine other purchasers bought one or more lots each, their aggregate bids being \$1,062.50. Busby and Andrews thereupon advanced ten per cent on these latter bids, and complied with the terms of sale. The clerk and master reported the facts, his report bearing date June 29, 1881. The administratrix and heirs filed exceptions as follows: 1. The price was inadequate; 2. The sale was appealed from, the rights of parties complicated, and bidders deterred; 3. The advance made was without any order of court, and the biddings should be opened generally. The chancellor, by decree of August 9, 1881, ordered the biddings to be opened as to the lots on which advances had been made, and kept open until the first Monday in September, when they should be closed; and the master was then directed to advertise the land for sale at public vendue, beginning the sale of each lot at the highest bid then made and complied with, and if no advance be made on the bids of Busby and Andrews, then at their bid as already complied with.

Under this order, on October 8, 1881, the master again offered the lands at public sale. At this sale, one W. S. Hubbard was the principal bidder. The master, upon a suggestion that Hubbard was a straw bidder, publicly announced that he would require the terms of the sale to be complied with by four o'clock,

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it being then between two and three o'clock, otherwise he would resell the property at once. Hubbard bid off the lots at the aggregate price of \$2,780, but, after some effort, announced that he would be unable to comply with the terms of sale until the succeeding Monday. The master, thereupon, said that he would proceed to resell, but if Hubbard remained the highest bidder, and should comply with the terms of sale according to his promise, or at any time before a confirmation of the sale, his bid would be accepted. With this statement, and a complete understanding on the part of all concerned, the master again put up the lots, and they were struck off to Busby and Andrews at an advance on their former bid of one dollar a lot. On October 10, 1881, the master filed his report of the sale, stating these facts. Exceptions were filed on the 17th of that month to the report, the first two being the same as the first two exceptions to the former report. The third exception was, that the prices offered by Hubbard were much higher than those of the persons to whom the lots were sold, and there was no evidence that he was acting in bad faith. The fourth exception was that by the usage of the master's office, and by law, a purchaser had a reasonable time to comply with the terms of sale, and Hubbard was not allowed such time. Affidavits were filed tending to show that Hubbard was employed by E. T. Irby and B. F. Adams to bid off the land for them. The first of these gentlemen says in his affidavit that he is able, willing and ready to bid a much higher price than Busby has given if he is

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permitted to do so, "and can at the same time be assured of acquiring a good title to the property under his purchase." The last says: "I would have complied with the terms of sale if I had been satisfied that I would have gotten a good title." These affidavits were made on the 10th and 13th of January, 1882, respectively.

The cause was heard January 13, 1882, upon the master's report of June 29, and October 10, 1881, the exceptions thereto, and the objections based on the affidavits, and the reports confirmed. Two days afterwards, one A. M. Boyd presented a petition for the opening of the biddings upon an offer by him of an advance of ten per cent on the bids of Busby and Andrews. The chancellor required these gentlemen to increase their bid to the amount thus offered, which they did under protest, and then again confirmed the sale at the advance. The heirs of the intestate alone appeal.

It will be seen from the foregoing statement of facts that there is no contest among bidders. Boyd acquiesces in the decree, and neither Hubbard, nor those for whom he acted as agent, ever offered to comply with his bid, although, under the announcement and agreement of the clerk on the day of sale, they had from October 8, 1881, to January 13, 1882, to do so. On the contrary, both Irby and Adams plainly say in their affidavits that they would not comply unless "assured of acquiring a good title." But the sale being for the benefit of creditors, and *in invitum*, the court had no power to give any such

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assurance: *Hously v. Lindsay*, 10 Heis., 651; *Staunton v. Harris*, 9 Heis., 579; *Foster v. Bradford*, 1 Tenn. Ch., 400. And an application to open biddings, based upon a condition that cannot be complied with, should not be entertained: *Lucas v. Moore*, 2 Lea, 1. The only question therefore is whether the sale as made was properly confirmed.

The sale of June 29, 1881, was entirely unexceptionable in the manner in which it was conducted, and the lots in controversy were then sold to nine different bidders for only \$1,062. It is, of course, no valid ground of exception to a master's sale that the prices obtained were inadequate. The only test of value at a forced sale is what the property will bring. And the best possible assurance that the bids were a near approximation to the actual value is that none of the original purchasers cared to increase their bids, and the heirs refuse to take the property at all except upon an impossible condition. There was no appeal from the original decree of sale, nor any right of appeal at the time when appeals were prayed and eventually refused. It is very certain that Hubbard's bids were a mere pretense, for the parties at whose instance they were made could have complied at any time within three months. There can be no doubt of the master's authority to demand an immediate compliance with the terms of sale where he has any reason to doubt the good faith of the bidder; for otherwise new advertisements, and new sales would have to be made indefinitely. The conduct of the master in the case before us was entirely correct and

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proper. He carried out the order of the court, and yet left to the apparent bidder ample opportunity to comply with his offer, and have the facts reported to the court. There is nothing, therefore, in any of the exceptions to the report. The biddings having been once opened with ample time given to all parties to make advances, and the property afterwards exposed at public sale, it was clearly a matter resting in the sound discretion of the court whether further time should be allowed or the sales closed: *Dupuy v. Gorman*, 9 Lea, 144. The creditors of the estate, and the actual bidders had rights which it was the duty of the court to respect, whether the heirs of the intestate were satisfied or not: *Mabry v. Churchwell*, 9 Lea, 488. The chancellor did right in confirming the sale at once at the final advance: *Morton v. Sloan*, 11 Hum., 279.

Affirm the decree with costs of this court to be paid by the appellants, and the cause will be remanded for further proceedings.

State of Tennessee and County of Shelby v. Ewing.

STATE OF TENNESSEE and COUNTY OF SHELBY v.
ROBERT EWING *et al.*

TAXES. *Lien. Bank of Tennessee.* The purchase of land by the Bank of Tennessee does not extinguish pre-existing tax liens.

FROM SHELBY.

Appeal from the Chancery Court at Memphis. W.
W. McDOWELL, Ch.

ATTORNEY-GENERAL LEA for the State.

FINLEY & PETERS for Ewing.

COOPER, J., delivered the opinion of the court.

Bill filed by the State and county of Shelby to collect taxes on realty bought by the Bank of Tennessee on August 12, 1871, at an execution sale for a debt due it. The chancellor was of opinion that no taxes due the State could be collected of the property of the Bank, whether such taxes accrued before or since the Bank acquired the property, but that the county might collect taxes which accrued before the Bank bought the property, including the taxes for the entire year of 1871, not those accruing afterwards. The clerk and master was, therefore, ordered to sell the land for \$833.92, the principal and interest of county taxes assessed before August 12, 1871, unless the amount was paid by the Bank in a given time. The Bank by its receiver appealed.

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It was held by this court, at an early day after the organization of the Bank of Tennessee, that the property of the Bank was exempt from taxation. The decision was put upon the ground that the Bank was a public institution created for the general benefit, and that "its lands and effects must necessarily be considered as the public property of the State": *Mayor and Aldermen of Nashville v. Bank of Tennessee*, 1 Swan, 269. The agencies and property of States, counties and towns are exempted by law, because if any portion of the public expenses are imposed upon them, it must in some form be collected from the citizens before it can be paid: Cooley Const. Lim. 514. The Code, therefore, exempted from taxation "all property belonging to the State, or to any county, or to the State Bank or branches": Code, sec. 542, sub-sec. 2. In a decision made at Nashville in the spring of 1882, the exemption was held to exist as to all the property acquired by the Bank for debt or otherwise after its general assignment, and in the course of the winding up of its business. The chancellor's decree is, therefore, correct as to all taxes accruing after August 12, 1871. The doubt is as to the taxes which were assessed and a lien on the property before that date.

The principle on which the exemption of public property rests as above would clearly not apply to taxes which accrued before the subject of the tax became public property. Those taxes would be a debt of the owner of the land at the time of assessment, secured by a lien on the land. Such a lien, we held at the last term at Nashville, would not be affected by a

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sale of the land under a subsequent tax levy. The purchaser who acquires the land merely for the tax for which it was sold, under the usual tax sale, would take the title subject to all pre-existing liens for other taxes. And no form of sale for taxes can affect prior liens. The lien of the State and county for taxes assessed on the property before the purchase by the Bank would, unless there is something else in the case, continue as before.

It is argued that the purchase of the property by the Bank was virtually a purchase by the State, and that a purchase by the State extinguishes or merges all prior liens. The argument is made in a double form. It is first said that the purchase extinguishes the prior liens by virtue of the realty thereby becoming public property. It is further said that the land has been bid in from year to year in the name of the Treasurer of the State whereby a legal title was obtained, and the subsequent purchase of the owner's equity creates a merger. The fact of bidding in is probably true, although it does not appear in the record sent up. Conceding the fact to be so, the interest acquired thereby would depend upon the validity of the tax sale, probably not put in issue in this case, and would not, as we have seen, interfere with other prior valid liens. The filing of the bill in this case for the collection of prior and subsequent taxes is moreover a waiver of any such right as is necessarily involved in the present contention. And we do not see how the fact that property is acquired for public purposes can extinguish existing and valid independent liens.

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But we think the position is unanswerable that if the liens are not extinguished by the purchase by the Bank, the lien of the State for pre-existing taxes exists in full force as well as the lien of the county. It is true, if the taxes bear but a small proportion to the value of land, it would be useless to subject the land to the payment of the State taxes. For it would simply change the form of the State's interest at the cost of the expenses of the operation. But if, as suggested in argument, the prior State, county and municipal taxes will absorb the entire property, the State is clearly entitled to its share or to the priority of satisfaction by virtue of its sovereignty.

In this view, if the State so elect, the decree of the chancellor will be reversed, and the cause remanded to ascertain the prior State taxes, and for further proceedings in accordance with this opinion. But whatever may be the fund recovered by the State for taxes, it will be paid to the receiver as part of the assets of the Bank of Tennessee. The costs will be paid by the receiver out of the assets of the Bank.

Holder v. Railroad.

11L 176
15L 150

**J. F. HOLDER v. CHICAGO, ST. LOUIS & NEW ORLEANS
RAILROAD COMPANY.**

1. **RAILROADS.** *Statutory precautions.* The provisions of the Code, sec. 1166, sub-sec. 5, prescribing the duty of a railroad company when an animal appears on the road to prevent an accident, do not apply in a case where the injury to stock is not the direct result of the moving train, and the company is not liable for an accident in which they were innocent of all blame, merely because one of the requirements of the statute was not complied with.
2. **SAME.** *Same.* Where, therefore, a mule jumped on the track of a railroad company in front of a moving train, ran on the road for two hundred yards, and then on a trestle, from which it leaped and was killed, the train being stopped before reaching the trestle, it was not error to charge the jury: "If you find that the defendant's train was stopped before it reached or overtook the plaintiff's mule, and that the mule was frightened at the time, and ran along the track of defendant's road, and jumped off and killed itself, the defendant would not be liable even if all the statutory precautions were not complied with by the defendant."

FROM GIBSON.

Appeal in error from the Law Court at Humboldt. J. T. CARTEL, J.

McDEARMON & TYREE for Holder.

HILL & WILLIAMSON for Railroad.

COOPER, J., delivered the opinion of the court.

Action for the value of a mule, in which the verdict and judgment were in favor of the defendant, and the plaintiff appealed in error.

The defendant's train was going north on schedule

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time on an up-grade, having to pass a trestle about twenty-five feet high. The evidence tends to show that when the train was in about two hundred yards of the trestle, the mule of the plaintiff jumped on the track some thirty yards in front of the engine, whereupon the engineer at once sounded the whistle, reversed the engine, applied the air brakes, and stopped the train within forty feet of the south end of the trestle. There was, however, testimony to the effect that the whistle was not sounded. The mule, it seems, ran along the road in front of the train and on to the trestle, from which it jumped and was killed. The judge, among other things not excepted to, charged the jury as follows: "If you find that the defendant's train was stopped before it reached or overtook the plaintiff's mule colt, and that the mule was frightened at the time and ran along the defendant's road, and jumped off and killed itself, then the defendant would not be liable, even if all the statutory precautions were not complied with by the employees of the defendant."

The Code, sec. 1166, sub-sec. 5, provides that when any person, animal or other obstruction appears upon the roadway of a railroad company, "the alarm whistle shall be sounded, the brakes put down, and every possible means employed to stop the train and prevent an accident." By sec. 1167 every railroad company that fails to observe these precautions "shall be responsible for all damages to persons or property occasioned by or resulting from any accident or collision that may occur."

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The argument on behalf of the plaintiff in error is, that when any obstruction appears on the road all the requirements of the statute must be complied with, if possible, under the penalty, in case of failure, of liability for all damages to persons or property occasioned by or resulting from any accident or collision that may occur; and that the damages in this case resulted from the accident which occurred. This court has certainly held the requirements of the statute to be mandatory in all cases falling clearly within its provisions. The rulings were at first that a failure to comply with all the requirements rendered the company liable for an injury by collision even where, as by the sudden jumping of an animal on the track, it was impossible for want of time to comply with all of the requirements: *Nashville & Chattanooga R. R. Co. v. Thomas*, 5 Heis., 262. The court has since modified the construction of the statute so as not to demand impossibilities: *East Tennessee & Virginia R. R. Co. v. Scales*, 2 Lea, 688. And I have myself grave doubts whether the rulings ought not still further to be restricted by construing the statute as throwing the burden of proof on the company if all the requirements are not complied with, and leaving to the jury to determine as a matter of fact whether the omission of one or more of the requirements contributed to the occurrence of the accident. I doubt whether a party can legally be held liable in damages for a mere omission to perform a mechanical act, which can be clearly shown not to have contributed to the injury for which the

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damages are claimed. It looks to me like violating fundamental principles of right under the idea of obedience to a legislative mandate, when the statute does not plainly require it, and would probably be unconstitutional if it did. Be this as it may, all of the decisions of this court in cases where the death or injury, for which damages were claimed, was directly occasioned by collision with the train of cars. This is the first case in which it has been sought to extend the construction of the statute to an injury not thus occasioned. The defendant's train did not, according to the hypothesis of the charge complained of, strike the plaintiff's mule at all, and was stopped as soon as could possibly be done after the animal was seen. The charge further proceeds on the theory that the animal, after unexpectedly jumping on the track, in its fright, for which the company was in no way responsible, ran along the track about two hundred yards, and, after failing to leave the roadway where it could do so with safety, jumped off at a dangerous point and killed itself. The omission of the company to comply with the statutory requirements, if it made any, was in failing to blow the alarm whistle, the blowing of which would almost certainly have added to the fright of the animal. And the question is whether the company shall be held liable for a loss to which, although the innocent cause, it in no way contributed, and which was not occasioned by a collision with its train. The statute, as construed, is sufficiently severe on the railroad companies where the

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injury complained of is directly inflicted. And we are not inclined to extend it to cases in which the train is not the proximate cause of the loss, and the accident not the result of the omission of any statutory requirement, but of the animal's own act. If it had jumped off the road at a safe place, and killed itself by running against a tree or a stone, it would scarcely be contended that the railroad company would be liable merely because it omitted to sound the whistle. In principle, the two cases are identical.

In the argument on behalf of the appellant, some stress is laid upon the words "accident or collision" used in the Code, sec. 1167, and it is insisted that the former word has a broader signification than the latter. But if this be conceded, the accident must be so far in the nature of a collision as to be produced by the train, as, for example, by steam from the engine, the shaking of the train, or the rush of wind created by its rapid motion. Beyond such possible cases, the two words are only different expressions of the same thing. The preceding section only uses the word accident, and the next succeeding section says that the railroad company that observes the precautions shall not be responsible for any damages "done to person or property on its road." And sec. 1169 is: "Where a railroad company is sued for killing or injuring stock, the burden of proof that the accident was unavoidable shall be upon the company." Construing these sections together as intending to convey the same meaning in

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different language, it seems clear that the injuries to persons and property provided against were injuries directly produced by the trains, and not injuries which stock might inflict upon themselves in the fright occasioned by the running of the trains in the legitimate exercise of the company's franchises.

Affirm the judgment.

W. J. HARRIS *et al.* v. SARAH MCCLANAHAN.

1. PLEADINGS AND PRACTICE. *Judgments and decrees. Collateral attack. Evidence.* It is the settled law of this State that domestic judgments of courts of general jurisdiction cannot be collaterally attacked by evidence outside of the record itself.
2. SAME. *Same. Same.* A recital in a domestic judgment or decree of a court of general jurisdiction that the original process was served on the defendant, or that publication, when allowed in lieu of service of process, was made, or that the party appeared by attorney or by answer, is conclusive when the record is collaterally put in issue, unless the recital is positively contradicted by the record itself.
3. SAME. *Same. Lost process. Evidence.* If the original process be lost, the testimony of the party cannot be permitted to avail against a recital in the judgment or decree of the fact of service, even in a direct attack, although the rule docket is silent on the subject.

FROM SHELBY.

Appeal in error from the Circuit Court of Shelby county. J. O. PIERCE, J.

Harris v. McClanahan.

HARRIS & TURLEY for Harris.

GANTT & PATTERSON, A. H. DOUGLASS and ISAAC MORRISON for McClanahan.

COOPER, J., delivered the opinion of the court.

Action of ejectment, tried by the court without a jury, in which judgment was rendered in favor of the defendant, and the plaintiff appealed in error.

It was admitted on the trial that the plaintiff's ancestor, John W. Harris, who commenced the suit, had a perfect legal title of record to the lot of land in controversy. John W. Harris had gone into the Confederate service, leaving the land in charge of an agent. The land seems to have been sold for taxes, and bought by one J. J. Sears during the war. On April 3, 1866, John W. Harris filed a bill against J. J. Sears, Francis McClanahan and Sarah McClanahan, his wife, the present defendant, to recover the land. The papers in the cause were lost, except the entries on the rule docket and the final decree, which were produced in evidence. It was agreed, however, that the bill alleged in substance that Harris was the owner in fee of the lot; that Sears had obtained a tax title, which was void and a cloud on complainant's title; that one Wimberley, as agent of Harris, was in possession of the land in 1861, and leased it to the defendant, Sarah McClanahan, believing she was a widow, when she was in fact the wife of Francis McClanahan, another defendant, who lived apart from her; that Sarah McClanahan had

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attorned to Sears. The rule docket—and it appeared that the clerk kept a regular rule docket, as required by law—contained no entry of the issuance or service of subpoena to answer or copy bill, but did contain an order of publication for Francis McClanahan, under date of April 3, 1866. It also contained an entry of notice to J. J. Sears and Sarah McClanahan, under date of April 10, 1866, of the taking of proof as to the appointment of a receiver. The final decree was rendered April 2, 1873, and set aside the tax title of Sears, declared the right of the complainant to the property, and awarded him a writ of possession. This decree commences thus: "This cause came on to be heard before the Hon. R. J. Morgan, chancellor, upon the bill and exhibit, upon *pro confesso* regularly taken, upon publication made as to the defendant Francis McClanahan, and upon subpoena duly served upon the defendant Sarah McClanahan, and upon the answer of J. J. Sears, the exhibits, agreements of counsel and proof in the cause." There was proof on the part of complainant tending to show that the defendant, Sarah McClanahan, had paid some rent to the receiver, and after the rendition of the decree had agreed to surrender the possession of the land to Harris. The present action of ejectment was commenced February 21, 1878.

The defendant, Sarah McClanahan, offered herself as a witness, and was permitted by the trial judge, over the objection of the plaintiff, to testify that no subpoena had been served upon her in the above mentioned chancery case, nor had she ever been noti-

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fied to appear and defend the suit, nor did she appear, or authorize anyone to appear for her, nor did she consent to, or have knowledge of any decree or order therein. She admitted notice that a reference was to be had to select a receiver. She was also permitted, over the objection of the plaintiff, to testify to an adverse holding of the land by her before the rendition of the decree. She introduced in evidence a deed to her of the land by a third person, which she took in 1869, under the advice of counsel, such third person having, she admitted, no claim to the land, and no consideration passing.

It has been held by this court that in a direct suit brought to impeach the validity of a judgment or decree for the want of service of original process on the defendant, the testimony of the defendant himself will not, upon the soundest principle of public policy, be allowed to prevail over the return of an officer of the fact of service: *Tatum v. Curtis*, 9 Baxt., 360; *Henry v. Wilson*, 9 Lea, 176. It has also been held in such a case that if the process be lost, the testimony of the party cannot be permitted to avail against the recital in the judgment or decree of the fact of service, where the recital is supplemented by an entry on the rule docket of the return of the process duly served: *Posey v. Eaton*, 9 Lea, 500. The verity of judicial records would be of little value if it could be annulled by such testimony alone. The result must be the same where there is a recital of service by the judgment or decree, although the rule docket is silent on the subject, or

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there is no rule docket required to be kept, or actually kept. For an entry on the rule docket is only the act of the clerk, not of the court, which he may neglect to perform, just as he may neglect to file and safely keep the process itself, as it is made his duty to do. When the court speaks in the record the fact cannot be impeached collaterally except by positive evidence of the record itself to the contrary: *Davis v. Reeves*, 7 Lea, 585.

But it is the settled law of this State, deemed indispensable to that sanctity of judicial proceedings necessary for the public welfare, that domestic judgments of courts of general jurisdiction cannot be collaterally attacked by evidence outside of the record itself. A recital of the judgment or decree by the court itself that the process was served, or publication—which is in lieu of personal service—made, or that the party appeared by attorney or by answer, is conclusive even against an infant or a married woman, when the record is only collaterally put in issue, unless the recital of the decree is positively contradicted by the record itself: *Hopper v. Fisher*, 2 Head, 253; *Kilcrease v. Blythe*, 6 Hum., 378; *Gilchrist v. Cannon*, 1 Cold., 582; *Walker v. Cottrell*, 6 Baxt., 258. His Honor, the trial judge, erred, therefore, in admitting the testimony of the defendant to impeach the record in this case.

The judgment must be reversed, and judgment rendered in favor of the plaintiff.

Taylor v. Railroad.

**JULIUS A. TAYLOR v. MEMPHIS & CHARLESTON RAIL-
ROAD COMPANY.**

PLEADINGS AND PRACTICE. *Bonds and coupons. Suit upon coupons. Guarantor.* The City of Memphis issued bonds, with coupons for interest. The Memphis & Charleston Railroad Company endorsed upon the bond a guaranty of prompt payment and interest. *Held*, a holder of a detached coupon may sue the guarantor in his own name, and he is not required to use the name of the holder of the bond.

FROM SHELBY.

Appeal in error from the Circuit Court of Shelby county. J. O. PIERCE, J.

W. H. CARROLL, METCALF & WALKER for Taylor.

HUMES & POSTON for Railroad.

DEADERICK, C. J., delivered the opinion of the court.

This cause, with a number of others, was tried and determined by the circuit judge, without the intervention of a jury, and judgment rendered for the defendant, from which the plaintiff has appealed in error.

The suits were begun before a magistrate, upon the defendant's guaranty of the payment of bonds and coupons of the city of Memphis.

The suit is brought to recover the amount of a number of coupons detached from different bonds. The coupons sued on are all past due. The obli-

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gation of the bonds from which the coupons were clipped, is to pay semi-annually, in the city of New York, on the first of July and first of January of each year, the interest, at the rate of 6 per cent, "on the presentation and surrender of the proper coupons hereunto annexed." The form of the coupons is as follows:

"CITY OF MEMPHIS. Warrant 54, for thirty dollars, being for six month's interest on bond No. 826, payable on the first day of January, 1881, in the city of New York.

"\$30.

A. B. TAYLOR,

"Mayor of the city of Memphis, Tennessee."

The guaranty endorsed upon said bond is as follows:

"For value received, the Memphis & Charleston Railroad Company assigns the within bond unto ———, and hereby guarantees the prompt payment of the principal and interest of said bond at the time and place indicated.



"Witness the seal of said company, and the signature of the President thereof, in conformity with a resolution of the Board of Directors and the By-Laws of the company.

"SAM TATE,

"President of the Memphis & Charleston R. R. Co."

It was shown that the city of Memphis, since 1874, was insolvent, and that no provision for the payment of the interest on the bonded debt of the city had been made, and none for the coupons in suit.

There was no controversy about the facts, nor as to plaintiff's being owner and holder of the coupons in question in this case.

The court held that in all cases in which the plaintiff held only detached coupons, and did not hold the bond or bonds from which they were detached, he had not the legal title to such coupons, and could

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not maintain suit thereon in his own name, but must sue, if at all, in the name of his assignor, immediate or remote, who had the legal title to the bond or bonds from which said coupons were clipped.

In this holding we think his Honor erred, notwithstanding there are cases which support this view.

The bonds from which the coupons were clipped bind the city to pay "on presentation and surrender of the coupon." The Memphis & Charleston Railroad Company guarantee absolutely the principal and interest of said bonds "at the time and place indicated." Neither the bond nor guaranty, nor coupon directs that said coupon shall be paid only to the holder of the bond from which it was detached, nor to any particular person. But the bond obliges the city to pay "on presentation and surrender of the coupon." The obvious meaning of the contract is, that the "presentation and surrender" of the coupon entitles the holder to receive payment of it.

In Baxter, 404, it is held a coupon may be negotiated after it has been separated from the bond as an independent security, and it is not necessary to produce the bond to entitle the holder to recover, citing cases.

It is also held in same case that coupons are intended as evidences that the holder is entitled to receive the amount at the time and place specified, and whatever their form the legal effect is the same. See also 2 Baxt., 296.

This we think the sounder and more just rule, and as conforming to the real intent of the contract.

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The plaintiff, it is shown, is the owner of the coupons, and the holder of them; that they have not been paid, and that the city of Memphis had made no provision for their payment at the time and place specified, and that defendant unconditionally guaranteed that the city should pay at the time and place designated. We are of opinion, therefore, that defendant is liable upon its guaranty for the amount of said several coupons.

These several suits were originally instituted before a justice of the peace, and judgments rendered by him in favor of the plaintiff, from which the defendant appealed to the circuit court.

Upon the rendition of judgment in said circuit court in favor of defendants, it was agreed by the parties that the justice's judgment, in all the cases, showed the true amount due upon said coupons, at the time of the rendition of said judgments, and that said justice's judgment should be taken as the true amount due therein at that time.

The judgment of the circuit court will be reversed, and a judgment will be rendered here, in each of said cases, affirming the justice's judgments, and for costs.

Franklin v. McCorkle.

D. C. FRANKLIN v. S. S. McCORKLE.

PLEADINGS AND PRACTICE. *Trial by jury. Amendment.* Pleadings which fail to ask for trial by jury cannot be amended by asking for a jury at a subsequent term, and it is error to allow the amendment. The failure to demand a jury by either party is conclusively held to be an agreement to try without a jury.

FROM GIBSON.

Appeal from the Circuit Court of Gibson county.
J. T. CARTHEL, J.

M. M. NEIL and SPL. HILL for Franklin.

J. S. COOPER for McCorkle.

TURNEY, J., delivered the opinion of the court.

This suit was commenced at the August term, 1880, of the circuit court of Gibson county. The declaration was filed August 19, 1880. Pleas were filed December 6, 1880, and on that day plaintiff in error continued the trial to the next term.

On December 24, 1880, defendant in error moved the court to allow an amendment of his declaration so as to demand a jury, which was allowed. This action of the court is excepted to.

The act of 1875, ch. 4, provides "that hereafter when any civil suit is brought in any of the courts of record in this State, whether such suit comes to such court by summons, appeal, *certiorari*, or otherwise, and which is now triable by jury, either party desiring a jury shall, in case of original suits, de-

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mand a jury in his first pleading, tendering an issue triable by jury, and, in the case of all other suits, shall demand a jury within the first three days of the term; and if no such demand is made as aforesaid, and in the manner and time as aforesaid, the clerk shall place such cause on the docket, to be styled "the non-jury docket," and a failure to demand a jury as aforesaid shall be deemed and held, conclusively, an agreement of the parties to submit all issues and questions of fact to the decision of the judge without a jury," etc.

In *Travis v. Railroad*, 9 Lea, 232, this court speaking through Chief Justice Deaderick, says: "The act of 1875 requires, when suits are originally instituted in courts of record, that the party demanding a jury shall do so in his first pleading, and, upon failure to do so, it shall be conclusively held to be an agreement to try without a jury."

The clerk is required to keep two dockets, and ought to do so in compliance with the direction of the statutes. But it is the failure to demand a jury by either party that is conclusively held to be an agreement to try without a jury, and the failure of the clerk to keep the two dockets is no part of such agreement, and cannot impair the operation of the statute in respect to the jurisdiction of the court to try the case."

This authority is conclusive of the present case.

The demand for a jury was not made in the first pleadings, nor at the first term, but at a subsequent term and after issues joined.

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The application to amend was based upon the fact that no non-jury docket had been kept and the court had made no rule of practice under the act. The statute is imperative. We have holden it constitutional, and must observe it.

Reversed.

11L	199
15L	198
16L	807

WM. LUNSFORD *et al.* v. J. W. JARRETT *et al.*

DOWER. *Entitled to, When.* A widow is entitled to dower in land contracted to be sold by the husband in his lifetime, if, after his death, the contract be rescinded on account of a defect in the vendor's title to the land.

FROM LAUDERDALE.

Appeal from the Chancery Court at Ripley. H. J. LIVINGSTON, Ch.

STEELE & STEELE for complainants.

JAMES OLDHAM for defendants.

COOPER, J., delivered the opinion of the court.

In March, 1872, Samuel A. Thompson, being the owner of the land in controversy, sold it to W. F. Greaves, executing to him a bond to make him a title upon payment of the purchase money. In June,

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1874, Thompson died intestate, leaving a widow and several children, and defendant, J. W. Jarrett, qualified as administrator of his estate. On May 12, 1875, the complainants, as creditors of the intestate and upon a suggestion of the insolvency of the estate, filed the original bill in this cause against the administrator, widow and children of the intestate, to administer the estate as insolvent. Such proceedings were had in the cause that the debts were ascertained, an account of the personal assets had, dower in the lands allotted to the widow, and the residue of the land sold to pay debts. After exhausting the proceeds of the lands and the personal assets except the debt due from W. F. Greaves as above, there remains an unsatisfied balance of debt due the complainants of several thousand dollars.

At the death of Thompson, Greaves owed him of the purchase money of the land first above mentioned about \$1,200, having made one payment of \$200 on the first of his notes. Jarrett, as administrator of Thompson, recovered judgments for the balance of said purchase money before a justice, and, on March 25, 1876, filed his bill against Greaves, and the widow and children of Thompson, to enforce the vendor's lien. Greaves answered, and filed his answer as a cross-bill to rescind the contract of sale on account of a defect in the title of the land. Such proceedings were had in this cause that in November, 1877, a decree was made, by consent of the parties to the suit, divesting the title of said lands out of Greaves, and vesting it in the children of

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the intestate by name. Thereupon the complainants in the cause now before us filed an amended and supplemental bill against the administrator, widow and heirs of the intestate, to subject the land thus recovered to the satisfaction of the balance of debt due them from the intestate's estate. The widow answered, admitting the facts to be true as charged in the amended bill, and claiming dower in the land specified, the same not having been included in the former allotment of dower. It was agreed that her answer might be taken also as a cross bill for dower. The amended bill was taken for confessed against the other defendants. The chancellor gave the widow dower, and the creditors appealed.

The claim of the widow to dower in this State is not regulated by the common law but by statute. The Code, sec 2398, is: "If any person die intestate, leaving a widow, she shall be entitled to dower in one-third part of all the land of which her husband died seized and possessed, or of which he was equitable owner." The seizin here meant is legal seizin in the sense of the common law, and to be "possessed," the party must have at least a legal right to possession: *Apple v. Apple*, 1 Head, 348; *Tipton v. Davis*, 5 Hayw., 278. A widow is therefore not endowable of an estate in remainder, because the husband was never seized and possessed: 1 Head, 348. Nor of land of which another person had, under a parol gift from the husband, acquired a possessory right by an adverse possession of more than twenty years, for the husband's right of possession

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was barred at the time of his death: *Keys v. Keys*, 11 Heis., 425. Nor to land levied on by execution against the husband and sold before his death, although by reason of the failure of the sheriff to make a deed to the purchaser the legal title remain in the husband, because the husband was not "seized" of the land at his death: *Rose v. Rose*, 6 Heis., 533. Nor, for the same reason, in land, the legal title to which may be in the husband, but the beneficial interest in infant children whose money was used in its purchase: *Gannaway v. Tarpley*, 194. Nor in land covenanted by title bond or other valid contract to be sold and conveyed by the husband to a third person: *Gass v. Hawkins*, Thomp. Cas., 238, 245.

After a contract of sale of land has been entered into, the vendor is from that time considered in equity to be the trustee of the purchaser, and the vendee, as to the equivalent which he is to give for the thing purchased, a trustee for the seller. The land contracted to be purchased will, upon the death of either of the parties to the contract, belong to the same persons who would have been entitled to it had a conveyance of the estate been executed. Consequently, upon the death of the vendor before the execution of the conveyance, although the legal title in the land devolves upon the heir, yet his executor or administrator will be entitled to receive the purchase money: *Stephenson v. Yandle*, 3 Hayw., 109; *Irvine v. Muse*, 10 Heis., 477. And the vendor, holding the title as a conduit through whom it

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is to be conveyed, has not such a seizin as will entitle the widow to dower.

In view of these principles, and treating the sale in the case before us as valid, it is clear that upon the death of Thompson intestate the naked legal title to the land in controversy descended to his children for the benefit of the vendee, the right to receive the purchase money went to the administrator, and the widow was not entitled to dower. The rights of all parties became fixed at the moment of intestate's death: *Wilkins v. Frierson*, 2 Sneed, 701, 710. If, however, the contract of sale was not what it purported to be, the result might be different. A deed in form absolute, but in reality only intended as a mortgage, would not deprive the widow of dower: *Turbeville v. Gibson*, 5 Heis., 565. A contract or conveyance absolutely void would be equally inefficacious to deprive the widow of dower. So, if for any reason either party could rescind the contract, and elected so to do; for it would then cease to be a contract. The contract of sale in the case before us was what it purported to be, and was not void *in toto*. And the question is, what effect did the proceedings subsequent to the death of the vendor have on the right of dower?

A purchaser in possession under a title bond or covenant to convey is not required to complete the purchase and accept a conveyance unless the title can be made according to the vendor's contract: *Topp v. White*, 12 Heis., 167. He may, however, elect to retain the land and have an abatement of price

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to the extent of the value of the deficiency: *Moses v. Wallace*, 7 Lea, 419. In the suit instituted by the administrator to enforce the vendor's lien, and to which the widow and heirs were parties, the vendee elected to rescind on account of a defect in the title of the vendor to the land, and filed a cross-bill for the purpose of obtaining the relief. If it had been successfully prosecuted, the beneficial interest in the land would have reverted to the estate, and by the doctrine of relation would date back to the time when the contract was entered into. The rights of the parties would then be as if no such contract had ever been made. The suit was not prosecuted to a final decree by the court upon its merits, but was terminated by a consent decree divesting the title of the land out of the purchaser and vesting it in the heirs of the vendor. The action of the parties is equivocal as exhibited in this record. It may be treated as a compromise of a doubtful litigation in which no concession is made on either side. In that view, something more would be required than appears to show that the purchaser was entitled to a rescission, and the rights of the parties interested in the intestate's estate would stand as at his death. On the other hand, what was done may be treated as a concession by the administrator that the purchaser was entitled to a rescission for a defect of title in the vendor, and his consent to vest the interest of the purchaser in the heirs is very persuasive of this view. If he was only compromising as administrator, he would have insisted upon a sale of the

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land under his amended bill, waiving only a personal recovery of any balance of debt against the purchaser. The chancellor adopted the view that the agreed decree was in effect a rescission, and there is not enough in the record looking in another direction to induce us to change the ruling. The complainants have, by the form of their amended bill, adopted the act of the administrator, and must abide his fate.

The chancellor's decree will be affirmed with costs, the costs to be reimbursed the appellants out of the fund in court.

GEORGE W. MARTIN, Administrator, v. ANN CROSBY.

GIFT OF EXEMPT PROPERTY. *To defeat creditors. Administrator.* A gift of personal property exempt from execution to take effect at the death of the donor, the sole object of which is to defraud creditors. when the exemption has ceased to exist, may be set aside by the administrator of the donor, for the benefit of creditors.

FROM GIBSON.

Appeal in error from the Law Court at Humboldt.
J. T. CARTHEL, J.

WARE & MARTIN for Martin.

Martin v. Crosby.

RANKIN & RHODES for Crosby.

COOPER, J., delivered the opinion of the court.

The complainant, as administrator of the estate of Elizabeth Crosby, deceased, filed this bill, under the Code, sec. 2395, alleging the insolvency of the estate, and seeking, for the benefit of creditors, to set aside a conveyance of certain personal property made by the deceased to the defendant, upon the ground that the conveyance was fraudulent as to those creditors. Elizabeth Crosby was a widow, living and keeping house on land in which she had a dower estate, the defendant, her granddaughter and sole next of kin, being a member of her family. She owned some personal property, the greater part of which was exempt from execution. Two or three days before her death, and in anticipation of that event, being advised of the probably fatal termination of the disease under which she was then suffering, she made the conveyance in controversy. The instrument is in form a deed, conveying the property to the defendant upon the "present trust" and "express condition" that Elizabeth Crosby, the grantor, shall keep and enjoy the property during her life without paying anything for its use, and, after her death, the said Ann Crosby "shall or may lawfully hold and enjoy the above described property and dispose thereof, intending by this indenture to give the said Ann Crosby at my death absolute title to all of the aforesaid property."

Whether this instrument be considered as a testamentary disposition, or as a deed conveying the prop-

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erty to the defendant with the reservation of a life estate in favor of the grantor, it is, in effect, a gift of the property to the defendant to take effect at the death of the grantor. The property conveyed was all that the grantor owned, and the gift was made in view of the speedy death of the grantor, and solely for the purpose of avoiding the payment of debts. The intent is shown not merely by the proof of the witnesses to that effect, but by the fact that the donee was the sole next of kin of the grantor, and entitled to the estate after the payment of debts. The gift is within the express prohibitions of the law: Code, secs. 1759, 1760. The exemption from legal process only existed during the life of the grantor. After her death, the property became liable for her debts, and a gift only intended to confer upon the donee a beneficial interest upon the happening of that event cannot be sustained.

The chancellor's decree will be affirmed, and the cause remanded for its execution. The appellant will pay the costs of this court, the residue of the costs to abide the orders of the chancellor.

Hannah v. The State.

WILLIAM HANNAH v. THE STATE.

CRIMINAL LAW. *Practice.* Counsel in argument may read law to jury. It is error in the court to refuse to permit counsel, in the argument of a case before the jury, to read the law to the jury.

FROM SHELBY.

Appeal in error from the Criminal Court of Shelby county. L. B. HERRIGAN, J.

— — — for Howard.

ATTORNEY-GENERAL Lea for the State.

TURNER, J., delivered the opinion of the court.

Plaintiff in error was convicted of assault and battery. During the trial of the cause, counsel for the defendant was arguing such legal propositions as he claimed were applicable to the facts of the case. The Attorney-General objected, and insisted that questions of law should not be argued to the jury.

The court ruled that counsel might argue the law to the court, and read his authorities to the court, but would not be allowed to read the law books to the jury or argue the law of the case to the jury.

This was error. It is impossible to understand how counsel can make out a case from facts, while he is forbidden to state and argue the law applicable to the facts.

Page v. The State.

It requires both facts and law to make a prosecution or defense in either civil or criminal proceedings.

Without facts there is no law to operate. To hold that the facts may be argued, but the law shall not be presented with these facts is to deny the benefit of counsel. The value of facts depend upon the law that governs them. No lawyer can discuss propositions except in a combination of law and facts. By our Constitution the accused hath a right to be heard by himself and counsel.

Reversed.

11L 203
13L 73

JESSE W. PAGE v. THE STATE.

CRIMINAL LAW. *Sale of liquor. Witness. Contempt.* The statute making it a criminal offense to retail spirituous liquors on Sunday is intended to punish the seller, not the buyer, and the latter may therefore be compelled to testify as a witness on the trial of an indictment against the seller, and may be punished for contempt in refusing to testify.

FROM SHELBY.

Appeal in error from the Criminal Court of Shelby county. L. B. HARRIGAN, J.

LUKE E. WRIGHT for Page.

ATTORNEY-GENERAL LEA for The State.

COOPER, J., delivered the opinion of the court.

Page was called as a witness on behalf of the State on the trial of an indictment against one Galloway for retailing liquors on Sunday. He had not been before the grand jury on the finding of the indictment. Being asked whether he had purchased liquor on Sunday within twelve months before the finding of the indictment, he declined to answer upon the ground that his answer might tend to criminate him. The Attorney-General then stated that he would not prosecute Page if he would answer. The witness still refused to answer upon the same ground that he could not be compelled to criminate himself. The court therefore adjudged Page to be guilty of contempt in refusing to answer questions and testify as a witness. Page appealed in error.

The question, it will be noticed, was unnecessarily broad. Conceding it, however, to have been proper, and that the answer of the witness would have shown a purchase by him from Galloway of liquor on Sunday within twelve months, it is clear that the witness could not be compelled to answer if the answer would have rendered him liable to a criminal charge for the same offense: 1 Gr. Ev., sec. 451. The statement of the Attorney-General was only morally obligatory on him, and was not such a protection from a criminal charge as a witness is entitled to by law to deprive him of the right not to be called on to criminate himself. The correctness of the judgment below turns upon whether the appellant was liable to an

indictment as the purchaser of the liquor for the sale of which Galloway was being tried.

The statute is: "No licensed grocer or other person in this State shall retail spirituous liquors on Sunday. The punishment of this offense shall be fine and imprisonment at the discretion of the court": Code, sec. 4861. The offense provided against is the sale by retail of spirituous liquors on Sunday. It is the act of retailing on that day that constitutes the essence of the offense, not the person to whom the sale has been made. It has consequently been held that the indictment need not specify the purchaser. And Nicholson, C. J., in delivering the opinion of the court, says: "It (the statute) is intended to punish those who sell, and not those who buy the liquor": *State v. Hickerson*, 3 Heis., 375. The court has reached the same conclusion in relation to the statute which prohibits the sale of intoxicating beverages within four miles of an incorporated institution of learning. The indictment need not, therefore, specify the person to whom the sale was made: *State v. Odam*, 2 Lea, 220; *State v. Staley*, 3 Lea, 566. And the buyer of the liquor is not indictable: *Harvey v. State*, 8 Lea, 113. In this view, the appellant would not have exposed himself to a criminal charge by his answer, and was guilty of a contempt in not testifying: Code, sec. 4106, sub-sec. 3; sec. 3823.

No point is made as to the right of the appellant to appeal from the judgment: *Brooks v. Fleming*, 6 Baxt. 331; *Hundhausen v. Insurance Co.*, 5 Heis. 702.

Affirm the judgment.

Railroad v. Reidmond.

11L 205
15L 150THE LOUISVILLE, NASHVILLE & GREAT SOUTHERN
RAILROAD COMPANY v. JAMES M. REIDMOND.

1. SUPREME COURT PRACTICE. *Motion to quash.* The Supreme Court will not notice a motion to quash a warrant which fails to state any ground for the motion.
2. PLEADINGS AND PRACTICE. *Misnomer.* A corporation may be known by several names, and can only take advantage of a misnomer by a plea in abatement, and no defense on this ground is admissible after a step in the cause recognizing the identity of the corporation sued with the corporation defending.
3. RAILROADS. *Obstruction.* To constitute an obstruction within the meaning of the statute prescribing the duties of a railroad company when a person, animal or other obstruction appears upon the road, the animal must be in a position to be struck or directly injured by the train while moving on the rails.
4. SAME. *Same. When statute does not apply.* The statute does not apply when the animal appears on some other part of the company's right of way, and the duty of the company in such a case is regulated by the principles of the common law.
5. SAME. *Same. Same.* Where an animal was on the company's right of way, six or eight feet from the end of the cross ties of the track, with its head turned from the road, and an unobstructed egress in that direction, it was error to charge the jury that it was the duty of the lookout to watch over the entire right of way, and whenever animals on any part of it are seen, to sound the whistle to frighten them away.

FROM TIPTON.

Appeal in error from the Circuit Court of Tipton
county. T. J. FLIPPIN, J.

H. B. FOLK for Railroad.

SIMONTON, YOUNG & BLACKWELL for Reidmond.

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COOPER, J., delivered the opinion of the court.

Action by Reidmond against the railroad company for value of a horse killed by the company's train. The verdict and judgment were in favor of Reidmond, and the company appealed in error.

The learned counsel of the plaintiff in error first insists that the circuit court should have sustained his motion to quash the writ. The record does show that such a motion was made and overruled. But it also shows that no cause was assigned or reason given for the motion. This court has repeatedly held that such a motion cannot be entertained, for the obvious reason that if the defect relied on were pointed out it might be remedied by amendment.

It appears from the argument submitted that the motion, as well as a subsequent motion in arrest of judgment, was based on the ground that the company was sued by a wrong name, its proper corporate name being the Louisville & Nashville Railroad Company. The record shows that the suit was commenced before a justice of the peace, the justice rendering a judgment against the company. The Louisville & Nashville Railroad Company probably appeared as the defendant and made defense, and at any rate that company certainly appealed from the judgment, the appeal bond reciting the judgment as being against the Louisville, Nashville & Great Southern Railroad Company. This was a recognition of the identity of the two companies. A corporation may, like an individual, be known by several names, and can only

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take advantage of a misnomer by plea in abatement: *East Tennessee & Georgia Railroad Company v. Evans*, 6 Heis., 607. The agreed statement of fact shows that the legal name of the defendant below is the Louisville & Nashville Railroad Company, but that it is also called the Louisville, Nashville & Great Southern Railroad Company, this last name being painted by the defendant on its passenger coaches, and printed on its bill heads. It is further agreed that the company advertises itself and is commonly known by the last name. Under these circumstances the objection now taken is not only untenable, but frivolous. It would have been much more to the purpose to have raised objection to the misnomer of the plaintiff below, his name appearing in the record in four different forms, and having two or three variations in the briefs of counsel.

The case was tried upon an agreed statement of facts. The train had just started from a depot, and struck the animal sued for before it had gotten under full headway. The engineer and fireman were both on the lookout and saw the animal at least five hundred yards before it was struck. The animal was standing outside of the track, six or eight feet from the end of the cross ties, on the left of the advancing train, with its head from the track. In its front were open woods, with no ditch or waterway to prevent egress in that direction, while the track behind was on a slight embankment. At the distance of four or five hundred yards from the animal, the alarm whistle was sounded, and continued to be sounded to

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within forty or fifty feet of the place where it stood. The brakes were also applied, and the speed of the train checked to about eight miles an hour, but the train was not stopped, nor an effort made to stop it, nor was the engine reversed. By reversing the engine, the train could have been stopped within the distance of fifty feet, without injury to the train or danger to the passengers, but not at a less distance at its then rate of speed. The animal continued standing where it was first seen until the engine was about twenty-five feet from it. At that moment it was hidden from the engineer by the smoke stack, and the fireman turned away, and commenced firing the engine. The agreed statement of facts concluded thus: "That the animal could not have been struck by the engine if it had continued standing where it was first seen, to wit: within six or eight feet of the end of the cross ties, but that it became frightened at the approach of the train, and attempted to dart across the track, and was struck, and knocked off on the right hand side of the road." The animal was blind of one eye, but the engineer and fireman were not aware of the fact. The train was under control of the engineer at the time of the accident.

The trial judge, in his charge to the jury, after giving the substance of the statute regulating the duties of the railroad company, its agents and servants, "when any person, animal or other obstruction appears upon the road" said: "The meaning of the statute is that when persons or animals appear on the track of the road as obstructions, so that if they do not move

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or get off the road bed they will be struck by the engine, then these provisions of the statute have to be complied with." And his Honor expressly repudiated the position assumed by the counsel of the plaintiff below, "that if the animal was on the right of way of the company, although not on the road bed or track, it would be an obstruction within the meaning of the statute." But, he adds, "it is the duty of the lookout to watch over the entire right of way, or on both sides of the track that is open and covered by the right of way, and whenever animals are discovered thereon to sound the alarm whistle to frighten them away, so that they may not become obstructions on the track, and it may or may not be necessary to stop the train at all to prevent an accident. The degree of caution and diligence to be exercised in cases of the sort must necessarily depend upon the particular facts of each case. The highest diligence is required, and for slight neglect the company is made responsible." His Honor then mentions some of the facts which might be looked to in determining the degree of diligence used.

His Honor refused to give the following charge as requested by the railroad company: "If you find from proof that the plaintiff's mare, when first seen by the engineer and fireman, was standing six or eight feet from the end of the cross ties, with her rear towards the ties, and that if she had remained there, she could not have been struck by defendant's train; that the alarm whistle was sounded, brakes applied, and speed of train retarded at the distance of four or

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five hundred yards, and until within forty or fifty feet of the mare, and that she continued standing as first seen until within twenty-five feet of the train, and cut off from the vision of the engineer by the front of the engine, and that there was no ditch, waterway, cut or fence in front of the mare to prevent her escape on the side of the railroad on which she was standing, then I charge you that there was no obstruction appearing on the road in the sense of the statute, and the defendant was not required to reverse the engine, and stop the train, or do more than was done."

His Honor was undoubtedly right in holding that an obstruction upon the road within the meaning of the statute was something in a position to be struck or directly injured by the engine or train while moving on the rails, and that an animal not thus situated but merely on some part of the company's right of way would not be such an obstruction: *Holder v. Cincinnati, St. Louis & New Orleans Railroad Company*, 11 Lea, 176. If the language of the learned judge, who delivers the opinion of the court in the case of the *Nashville & Chattanooga Railroad Company v. Anthony*, 1 Lea, 516, was intended to give a broader meaning to the word "road" as used in the statute, it was inadvertent, and not required by the facts or essential to the point actually decided. On the contrary, the court expressly approved the charge of the trial judge in that case that "strict application of the rule laid down by the statute would not be required if the animal was not on the bed." The requirements of the statute

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must always be complied with in such a case, if possible. This court has uniformly so ruled. The statute does not apply when an animal appears merely on some other part of the right of way. In such a case, it is the duty of the employees of the company to use such precautions and care as will prevent a collision with a frightened animal running so near the road as to make it probable that it would be forced by obstructions to cross the road when too late to prevent an accident. In other words, the duty of the company is not regulated in such cases by the statute, but by the principles of the common law. His Honor erred, therefore, in saying that it was the duty of the lookout to watch over the entire right of way, and whenever animals are discovered on any part of it, to sound the alarm whistle to frighten them away. The sounding of the whistle is a requirement of the statute in the case of obstructions upon the road proper. It is not an imperative duty in any case unless prescribed by statute, although the failure to resort to it might be negligence which would render the company liable in particular cases. The company is undoubtedly bound in contingencies not within the statute to the necessary degree of diligence to prevent an accident, both in the outlook, and in the resort to proper precautions. Whether the blowing of the whistle would be a precautionary act of diligence in a particular case would be for the jury to determine upon a proper charge.

His Honor erred also in making his charge too general, and not directing it more pointedly to the facts

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agreed on. The defendant was entitled to a charge upon these facts, although not necessarily in form of the request made. The turning point of the case was whether the company was guilty of negligence. It is of course not required of a railroad company that it shall stop its train, or even slow up every time an animal is seen on any part of the right of way. It would be impossible to keep to the schedule time of the trains, which is so essential to the convenience of the public and the safety of the traveling community, with such a requirement. It may be, under these circumstances, inasmuch as the agreed facts show that the whistle was sounded and the brakes put down in this case, that the jury may find that there was no failure on the part of the company to use all proper precautions up to the time when the train was within twenty-five feet of the plaintiff's mare. The attention of the jury should therefore, in the event they should so find, be directed to the point whether there was any negligence on the part of the company in the omission of precautionary measures after that point of time, or whether anything could have been done after the dart of the animal on to the track.

Reverse and remand.

Wells v. Collins.

J. J. WELLS v. E. S. COLLINS *et al.*

1. CHANCERY COURT JURISDICTION. *Partnership, Resident and non-resident partners.* The chancery court of a county in which a partnership was formed and conducted has jurisdiction, by statute, of a suit by a resident partner against a non-resident partner for a partnership settlement, or to ascertain a debt growing out of the partnership transactions, and to issue to other counties attachments, injunctions or other necessary process.
2. SAME. *Same. Same.* If, in addition, the object of the bill be to attach a judgment recovered by the non-resident defendant against a third person, and to have the benefit of any recovery in a suit commenced by him in the chancery court of another county for the collection of the judgment, the object may be attained by impounding the recovery, without interfering with the prosecution of the suit, but if the injunction sued out be broader than it ought to be, it would not effect the jurisdiction of the court granting it, being subject to be modified on motion.
3. CHANCERY PLEADINGS AND PRACTICE. *Agent. Lien. Necessary parties.* An agent of the defendant, who has a lien for services upon the fund sought to be reached, is a necessary party to the suit.

FROM GIBSON.

Appeal from the Chancery Court at Trenton. JOHN SOMERS, Ch.

COOPER & HAYS for complainant.

HALL & HARWOOD and THOMAS STEELE for defendants.

COOPER, J., delivered the opinion of the court.

The chancellor sustained a demurrer to this bill, and the complainant appealed.

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The bill alleges that complainant and defendant Collins, in the latter part of 1871 or early in 1872, entered into a partnership for the purpose of making and selling a cotton and hay press, of which Collins had obtained letters patent; that complainant had advanced money in obtaining the patent, and was to advance money and material in the making of the presses to be repaid by the firm, Collins superintending the making and vending the machines. That the business was unprofitable, and loss, by the terms of the partnership, was to be borne equally by both partners; that the firm ceased to do business in 1873 or 1874, but there never was any formal dissolution, nor any settlement of the partnership accounts; that the defendant sets up a claim for services to the firm, which, if allowed, would leave him indebted to complainant in the sum of \$789, without interest, and over \$1,000 if his claim be not allowed; that the firm was formed in Trenton, Gibson county, Tennessee, and had its place of business, shops, etc., at that place. The bill then states that in October, 1874, defendant Collins recovered a judgment before a justice in Lauderdale county for about \$270, against one Kneeland Eison, and had shortly before filed a bill in the chancery court of that county against Eison and one John H. Pillow to collect said judgment by subjecting certain land that Eison had conveyed to Pillow. That Thomas Steele was the agent and attorney of Collins in the prosecution of the suit, and claimed but was not entitled to a lien on the proceeds for fees. That Collins was totally insolvent, a non-resident of

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this State, and a resident of the State of Texas. The bill prays that the complainant be allowed to recover a judgment against Collins for all that Collins may owe him, that proper references be had, etc.; that the judgment in favor of Collins against Eison be attached, and complainant be subrogated to all the rights of Collins against Eison. The bill further prayed that Eison and Pillow be enjoined from paying the justice's judgment, or any decree entered thereon until the further order of the court, and that Collins and Steele be enjoined from collecting the judgment from Eison until the further order of the court, and from assigning the judgment. All of these parties were made defendants. Process of subpoena was served upon Eison in Gibson county, and counterpart writs run to Lauderdale county. The bill was filed in the chancery court at Trenton.

The defendant Collins assigns as one cause of demurrer to his bill that the court had no jurisdiction of the cause, the jurisdiction belonging exclusively to the chancery court of Lauderdale county. But the bill is filed for a partnership settlement between complainant and Collins of a business begun and carried on in Gibson county, and to enforce the collection of a debt originating in that county, alleging that Collins is a non-resident of the State. By the Code, sec. 4311, sub-sec. 4, bills against non-residents may be filed in the (chancery) district in which the cause of action arose. And by sec. 4307, if the suit is properly instituted, attachments, injunctions, and all other process known to the court, and necessary to attain the

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ends of justice, may be issued to any other county. So, also, by sec. 4306, counterpart summons, with copies of the bill, may issue to any other county in the State for defendants not to be found in the county in which the suit is properly brought. The first cause of demurrer assigned is therefore clearly not well taken.

The second cause assigned is that the court has no jurisdiction to enjoin or in any manner restrain the proceedings in the chancery court of Lauderdale county. But if this were so, it would only be a ground for dissolving the injunction, not for dismissing the bill, as to the main subject-matter of which and the parties the jurisdiction, as we have seen, is clear. The injunction, however, is not as broad as the demurrer assumes. It does not in terms enjoin the parties from proceeding to prosecute the suit in the chancery court of Lauderdale county to final decree, but inhibits the transfer of the judgment attached, and the payment of the amount due thereon until the further order of the court. If the injunction was intended to interfere with the prosecution of the suit, it was improvidently granted. For Collins had the right to pursue his action to a successful conclusion, if entitled to it, and complainant, who acquired only a lien on the judgment by his attachment, should not be permitted to deprive him of the benefit of the action. All that the complainant could justly claim was to impound the fund pending his suit, and, if successful, to appropriate the proceeds to the satisfaction of his debt. This end would be attained by enjoining the parties defend-

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ant from assigning the attached debt, and receiving the fund, but allowing the suit to be prosecuted, and the proceeds realized paid into the receiver of the court for the benefit of whom it may concern. The injunction, in that view, would operate only on the parties, not the court. If the injunction is too broad, the chancellor would no doubt have modified it on application. And either party may secure proper attention to the suit by the appointment of a receiver.

The remaining cause of demurrer is that the claim of the complainant is barred by the statute of limitations. This bill was filed April 2, 1880. It alleges that the firm of Collins & Wells was never formally dissolved, but ceased to do business in 1873 or 1874. If dissolved after April 2, 1874, the only limitation applicable to the character of claim would not have attached. The presumption in this State is in favor of the pleader, and the doubt as to the time of dissolution, if that were the test, would enure to the complainant's benefit. But the bill further alleges that there never has been any partnership settlement, and the statute in such cases does not apply: *Bolton v. Dickens*, 4 Lea, 569.

The defendant Steele also demurrers to the bill, relying upon the first and second causes assigned by his co-defendant. They are equally unavailing in his behalf. He also insists that he is neither a necessary nor permissible party, because, although the demurrer does not say so, he is merely the agent of Collins his co-defendant. But the bill, and his own demurrer, which on this point speaks somewhat loudly, shows

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that he is something more than a mere agent, having or claiming a lien upon the fund expected to be recovered by the suit in the chancery court of Lauderdale county. He is therefore a necessary party to the adjustment of the complainant's right.

The decree must be reversed, the demurrer overruled, and the cause remanded for further proceedings.

ALEX. MURRAY and S. E. RIDGELY v. THE STATE.

LICENSE PRIVILEGE. *Merchant tailors* Merchant tailors are required to take out license as a merchant.

FROM SHELBY.

Appeal in error from the Circuit Court of Shelby county. J. O. PIERCE, J.

— LEHMAN for Murray.

ATTORNEY-GENERAL LEA for the State.

COOKE, Sp. J., delivered the opinion of the Court.

The defendants were indicted and convicted under sec. 682c of the Code, which is as follows: No merchant shall commence or continue business in any county in this State without obtaining a license from

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the clerk of such county, in accordance with the provisions of this act; and every person or individual member of a copartnership so offending shall be subject to prosecution for each day's violation of this law; and, on conviction, shall be fined not less than one hundred dollars for each offense."

The facts proven on the trial were, that the defendants were copartners and carried on the business of merchant tailors in Memphis. They kept on hand a stock of goods, which they purchased outside of the State, and made them up into clothing and sold them upon orders of their customers. When a customer desired a suit of clothes or a garment they permitted him to select from their stock the particular piece of cloth or stuff he desired them made of, and they took his measure and made up the articles of clothing and sold them to him. They kept in their employ tailors for the purpose of making up their goods into clothing for their customers, whom they charged for the cloth of which the clothing was made, as well as for the labor and skill of making them up. They had been doing business in Memphis for some years, and always previous to the first of January, 1883, had taken out merchants' license, but at the beginning of the present year they failed to take out any license, but continued to do business in the manner above stated until the 12th of May, 1883, when the indictment was found against them.

During the time they had license they would sometimes sell a piece of cloth, or some article of trim-

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ming or buttons, to a customer, without being made up, but since they had failed to take out a license they had ceased to sell any articles unless made up into clothing.

The court was requested by the defendants to charge the jury that persons who manufacture and supply goods alone to the previous orders of their customers, although they keep on hand the materials from which the manufactured articles are produced, are not merchants, and are not required to have a license, which, under the statute, merchants are required to procure; and if they found that the defendants, while they had no license as merchants, had a stock of goods from which they manufactured garments for customers as they received orders for making them, and that this constituted their business, they should acquit the defendants.

The court declined to give this instruction, but charged the jury, among other things not excepted to, that if the defendants had a place of business in Memphis, at which they had a stock of goods which they used to make up garments for customers, whenever they might receive an order or orders for so doing, and that if they received pay for such garments made up on such orders, then they were merchants, and must procure license as merchants, and their failure to do so within the period of one year, renders them guilty of the offense charged in the indictment: And if they found that the defendants did business with a stock of goods, by taking orders for making gentlemen's garments, for compensation or

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profit, charging for both the cloth and the work, and securing [pay therefor, etc., they should convict the defendants.

This portion of the charge, as well as the refusal to give the instruction asked for, is now assigned as error.

We think there can be no question but that the defendants were merchants within the meaning of the statute above quoted, and were bound to obtain a license in order to carry on business in the manner above stated, and that the charge given to the jury was correct, and that the defendant was not entitled to the instructions as requested: *Singleton v. Fritsche*, 4 Lea, 93; *Naff, Coffman & Martin v. Russell*, 2 Cold., 37.

There is no error in the record, and the judgment must be affirmed.

O. ALEXANDER v. J. W. WILKES, Executor.

ESCROW. *Promissory note.* A promissory note may be delivered by the maker to the payee upon condition, or as an escrow.

FROM HAYWOOD.

Appeal in error from the Circuit Court of Haywood county. J. T. CARTHEL, J.

Alexander v. Wilkes.

H. B. FOLK for Alexander.

JESSE NORMENT for Wilkes.

COOPER, J., delivered the opinion of the court.

J. W. Wilkes as executor of P. C. Wilkes, deceased, brought this action against O. Alexander on a promissory note. The verdict and judgment were in favor of the plaintiff, and the defendant appealed in error.

The note was in the usual form, except that there was a scroll or mark for a seal opposite the name of each of the two makers of the note, J. C. Wilson and O. Alexander, and a third seal as if for an additional signature. The defendant, Alexander, pleaded that he signed the note as surety for J. C. Wilson, and in renewal of another note on which defendant and W. J. Lyle were the sureties of Wilson; that he signed the note with the express understanding with the plaintiff's testator, to whom the note was payable, that defendant was not to be bound on the same until the plaintiff's testator got W. J. Lyle, or some other person of equal solvency, to sign said note, and then surrendered the old note; and that the plaintiff's testator did not get Lyle or any one else of equal solvency to sign the note, nor did he ever surrender the original note.

There was proof introduced by the defendant tending to show that the delivery of the note to the payee was conditional. The trial judge charged the jury: "If you find from the testimony that plaintiff's

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testator held a note on J. C. Wilson as principal, and defendant and Lyle as sureties, and that the note sued on was executed by J. C. Wilson and defendant, and delivered to Wilkes the payee in renewal and satisfaction of the old note, and was accepted by Wilkes in renewal and satisfaction of the old note, then the plaintiff would be entitled to recover; and this would be so, even though it should appear that at the time of the execution and delivery of the note sued on, it was stipulated that said Lyle was also to sign the note sued on, and defendant signed and delivered it to the payee on that condition."

His Honor refused the request of the defendant to deliver the following charge: "If you find from the proof that the note sued on was made by J. C. Wilson as principal and defendant as surety, and delivered to P. C. Wilkes, the payee, with the express agreement that defendant was not to be bound on it until the original note was delivered up, and the name of W. J. Lyle, or some one of equal solvency was procured on the note, and that P. C. Wilkes accepted the note on that condition, and that the condition has never been complied with, then the defendant is not liable upon the note sued on, and you should find a verdict for the defendant."

The charge of his Honor, the trial judge, is open to objection that it does not apply to the testimony upon which the defendant sought to rest his defense. It is true, the jury might have found from all the evidence before them, in the language of the judge, "that the note sued on was executed by J. C. Wilson

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and defendant, and delivered to Wilkes, the payee, in renewal and satisfaction of the old note, and was accepted by Wilkes in renewal and satisfaction of the old note," and that the stipulation that Lyle was also to sign the note was a condition to be performed by the makers of the note, not by the payee. But the theory of the defense was that the note was not delivered and accepted at all, as a completed instrument, in satisfaction of the old note, but that it was only to be accepted in satisfaction, and the old note delivered up when another person was procured to sign as a co-maker. There was evidence upon which the jury might have found that the delivery was not absolute but conditional. The defendant was entitled to have the law charged upon this state of facts. The charge has been construed in the argument on behalf of the appellee as meaning that a note could not be delivered to the payee upon condition, or as an escrow, and that if so delivered, the condition would be of no avail, and the delivery absolute. But his Honor does not say so. He merely says that if the note was delivered by the two makers, and accepted by the payee in satisfaction of the old note the contract would be complete, and the condition would not affect the payee's rights, which might be true if the condition was to be performed by the makers of the note.

The charge which his Honor refused to give does raise the question which has been so fully and ably argued by the counsel, and that is whether a promissory note can be delivered by the makers to the payee upon a condition, or, to use the technical word

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applicable to instruments under seal, as an escrow. The instrument in the case before us does have a seal or scroll affixed to the names of the makers, but, as the use of private seals has been abolished by the Code, it is in effect only a promissory note.

An escrow, as defined by the common law, is a written instrument delivered to a third person to take effect on the happening of a contingency. The term was originally applied to a deed, but has been extended first to sealed obligations, and then to written contracts generally. And it has been usually held that if the instrument be delivered into the manual possession of the grantee, it cannot operate as an escrow, though the parties may both have meant it should. It will, in such case, take effect discharged of the condition. This rule of the common law was recognized in *Johnson v. Branch*, 11 Hum., 521, and *Brown v. Reynolds*, 5 Sneed, 639. In the first of these cases, the delivery was by the surety to his principal to procure an additional surety named, not to the obligee. In the second case, the delivery was to the obligee to be handed to a third person to keep. In *Majors v. McNeilly*, 7 Heis., 294, the delivery of the notes was by the surety to the payee upon his agreement that they should not be operative until another surety was procured, and that he would hand them to the principal obligor to procure the other surety, but the payee, it seems, never did hand the notes to the principal. The surety was relieved in this case, as was the obligor in the next preceding case cited. In *Breeden v. Grigg*, 8 Baxt., 163, the delivery was by the makers of the

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note directly to the payee, and upon a condition, the instrument being treated by the court as an escrow, and the maker was relieved, even after judgment at law on the note, upon a bill in chancery. The court met the objection that the defense should have been made on the trial at law by saying that the remedy was not clear and unembarrassed at law.

From this review of our decisions, it will be seen that the rigid rule of the common law has been modified in this State so as to give relief both at law and in equity although the delivery may have been directly to the payee or obligee. In *Brown v. Reynolds*, which was an action of covenant at law, the notes were delivered to the payee upon condition, to be by him handed to a third person to be kept, but it does not appear that they were ever turned over to such person. And, in any event, the stipulations of the condition were made with the payee, and his undertaking to hand the notes to another person was itself a condition. If a valid condition for any purpose may qualify the delivery to the payee, the logical result is that the delivery may always be accompanied by a qualifying contract. And if equity will relieve in such a case even after a judgment at law, the rule that the defense cannot be made at law becomes merely technical. If the condition be such as to prevent the instrument becoming the act and deed of the maker until the contingency happen, the remedy is at law by special plea of *non est factum*. And if the condition be such as to make the failure to comply with it a fraud upon the makers, the remedy is either at law or in equity,

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the courts having concurrent jurisdiction, although less embarrassed in a court of equity.

The written plea filed in this case is a special plea of *non est factum*. The plea, as copied into the record, does not show that it was sworn to as required by statute in all cases in which the instrument is the foundation of the action: Code, sec. 3777. It seems to have been treated in the court below, and certainly in the argument in this court as a valid plea. The absence of an affidavit has not been assigned as error, nor do we think the assignment could be entertained for the first time in this court. The suit was, moreover, commenced before a justice of the peace, and no pleadings were required except when prescribed by statute. The defense of fraud because of the violation of the condition upon which a note was delivered might be made without written plea if the fraud was such as not to avoid the instrument as the act and deed of the makers, but not if it amounted to a denial of the execution of the instrument.

The plaintiff insists that the note sued on was delivered and accepted by the plaintiff's testator without any condition binding on him. The defendant relies upon the condition set out in his plea. It is for the jury to find the true facts upon a correct charge. The charge before us is erroneous because it does not meet the matters of defense relied on.

The judgment must, therefore, be reversed, and the cause remanded for a new trial.

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11L 228
12L 314
1pi 351
2pi 451

ANN E. ENOCHS v. JOHN W. WILSON *et al.*

1. HOMESTEAD. *Mortgage.* A wife, who joins her husband in conveying the land on which they have a homestead right of the value prescribed by law, cannot afterwards claim a homestead in another part of the same tract of land previously mortgaged by the husband.
2. CHANCERY PLEADINGS AND PRACTICE. *Interlocutory order. Appeal. Supersedeas.* An order appointing a receiver for the purpose of taking possession of property in litigation, and managing it for the interest of all parties, is in its very nature interlocutory, no matter at what stage of the case it may be made, can neither be appealed from directly nor superseded under the special provisions of the Code authorizing the *supersedeas* of certain interlocutory orders. But such an order is brought up by a general appeal on final hearing, and will remain in force if executed, and may be executed by this court, upon application, either directly, or by *procedendo* to the court below.
3. BOND. *To what extent not binding.* The provisions of a bond executed in the progress of a cause beyond the requirements of the law or the fiat of the judge are not binding.

FROM DYER.

Appeal from the Chancery Court at Dyersburg.
JOHN SOMERS, Ch.

HILL & WILLIAMSON and PARKS for complainant.

LATTA & MARSHALL for defendants.

COOPER, J., delivered the opinion of the court.

James W. Enoch, the husband of the complainant, Ann E. Enoch, early in the year 1870, bought from one person a tract of land of 146 acres, and from another person an adjoining tract of land of 100 acres.

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He resided with his wife and children on the tract of land of 146 acres, the two tracts constituting one farm, although the tract of 100 acres was, it seems, usually rented out to tenants. On January 5, 1876, James W. Enoch conveyed the tract of 100 acres to the defendant John W. Wilson, in trust to secure a note of the said Enoch executed on the same day to P. E. Wilson for about \$1,585, bearing interest at the rate of ten per centum per annum. The trustee was authorized, upon default in payment of the note and interest, to sell the land in satisfaction of the debt for cash. The land thus conveyed was worth about twenty dollars an acre, and the residue of the land of Enoch was of equal or greater value. Afterwards, on February 23, 1876, Enoch sold and conveyed to M. O. King ten acres of the land reserved. On March 20, 1876, Enoch and wife conveyed seventy acres more of the land reserved to one Segroves for the benefit of certain creditors. On March 23, 1877, Enoch sold and conveyed the residue of his land, including the improvements in which he resided with his family, to H. Fuller, his wife's father, for the consideration of \$2,000. The deed purports to be by James W. Enoch, but it is signed by his wife, and her privy examination is taken to its execution. The evidence leaves little doubt that this conveyance was without consideration and made to hinder and delay the creditors of James W. Enoch. He and his family continued to reside upon the land as before. He afterwards went into voluntary bankruptcy, and received the usual bankrupt discharge.

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John W. Wilson, the trustee under the deed of assignment made to secure the debt to P. E. Wilson, undertook to foreclose that deed by a sale of the land in accordance with the power conferred, no part of the debt having been paid. Thereupon, the original bill in this cause was filed, February 14, 1878, by Ann E. Enoch, the wife of James W. Enoch, against her husband, John W. Wilson and P. E. Wilson to enjoin the sale of land by the trustee, and assert her right to a homestead therein. The Wilsons answered, and filed their answer as a cross-bill to have a sale of the land under the trust deed. Upon final hearing, the chancellor dismissed the original bill, and granted the relief prayed by the cross-bill. The original complainant, Ann E. Enoch, appealed.

The chancellor's decree was undoubtedly correct. The husband of the complainant, as the head of a family, had the right by his own conveyance, without the wife joining therein, to make a valid mortgage or trust assignment of a part of the farm on which he was living, provided he retained a sufficiency of land with the improvements thereon in which he was living to constitute a homestead exemption. And if the wife afterwards join the husband in mortgaging or conveying the homestead reserved, she cannot claim a homestead in the land previously mortgaged by the husband alone: *Hildebrand v. Taylor*, 6 Lea, 659. The land finally sold to the complainant's father with her assent, she signing and acknowledging the execution of the deed privily and apart from her husband, and on which the homestead improvements were located,

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was worth more than the value of the homestead allowed by law. She had clearly no claim to homestead in the land conveyed to Wilson, and her bill was properly dismissed.

The chancellor, upon final hearing, being satisfied that the land conveyed in trust was not worth the amount of the debt secured and that the debtor was utterly insolvent, appointed a receiver to take charge of and rent out the property pending further litigation, and until the land was sold under the decree and the sale confirmed. And he ordered a writ of possession to issue to put the receiver in possession of the land "notwithstanding any appeal prayed or granted to the Supreme Court." These orders were embodied in the final decree. The complainant, Ann E. Enoch, by next friend, prayed and obtained an appeal from this decree upon giving bond with security for costs, which was done. Afterwards, upon application by her to one of the judges of this court, a *supersedeas* was granted to supersede the order appointing a receiver, "upon the petitioner giving bond with security as required by law."

Upon this state of facts, the complainants in the cross-bill now move the court to discharge the *supersedeas* thus granted, and to grant them a recovery of the damages sustained by the *supersedeas* upon the bond executed in this court in conformity with the fiat of the judge granting the *supersedeas*.

There can be no doubt that in a proper case a receiver may be appointed at the hearing, and as a part of the final decree: High on Rec. sec. 109; *Merrill v.*

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Elam, 2 Tenn. Ch., 513. Ordinarily, the appointment of a receiver is by interlocutory order, for the safe keeping of the property, and no *supersedeas* will lie to its execution under the Code, sec. 3933: *Bramley v. Tyree*, 1 Lea, 531; *Roberson v. Roberson*, 3 Lea, 50. The same is true of an order granting a temporary injunction: *McMinnville & Manchester Railroad Company v. Huggins*, 7 Cold., 218. So of an order dissolving an injunction: *Park v. Meek*, 1 Lea, 78. But when the dissolution of an injunction is the consequence of a final decree, an appeal would continue the injunction: *Kearney v. Jackson*, 1 Yer., 294. The appeal from a final decree in chancery would not affect the functions of a receiver appointed by interlocutory order who has gone into possession of property under it: High on Rec., sec. 29. But the effect of such an appeal upon the appointment of a receiver embodied therein, or made after the final decree, seems never to have been definitely determined.

In *Merrill v. Elam*, 2 Tenn. Ch., 513, the debtor defendant appealed from a final decree confirming a sale of his land under previous decrees. Upon application of the purchaser, who was also the complainant, and it appearing that the defendant was in possession of the land and insolvent, the chancellor appointed a receiver, first setting aside the order granting an appeal, and then giving the defendant permission to change the prayer of appeal so as to include the order appointing the receiver. This court, upon appeal, discharged a *supersedeas* of the order granted by one of the judges, and issued a

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mandate to the chancery court, in the nature of a *procedendo*, "that the execution of the decree as to the issuance of a writ of possession be proceeded with": *Payne v. Baxter*, 2 Tenn. Ch., 519. In *Hoge v. Hollister*, 8 Baxt. 533, where a similar order had been made by the chancellor for a receiver after a decree ordering the sale of realty, this court on appeal superseded the order upon the ground that the appellant, who claimed a homestead right in the lot in controversy, ought not to be deprived of the possession pending litigation. Both of these cases seem to concede the power of the chancellor to appoint a receiver after final decree, and while the suit is yet in his court, but recognize the right of this court to supervise his action when the case has been brought up by appeal.

An order appointing a receiver merely for the purpose of taking possession of property in litigation, and managing it for the interest of all parties, is in its very nature interlocutory, no matter at what stage of the cause it may be made. All of the courts of this State, and the judges thereof, are clothed with the power to appoint receivers "for the safe keeping, collection, management and disposition of property in litigation," whenever necessary to the ends of substantial justice: Code, secs. 3768, 3948. Such an order can neither be appealed from directly, nor superseded under the special provisions of the Code authorizing the *supersedeas* of certain interlocutory orders: Code, sec. 3933. Such orders, as well as all other proceedings in a chancery cause, are brought up for

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revision by a general appeal, but remain in force unless otherwise ordered by this court. If any action of the court is required for their execution, the application must be made in such a case to this court, which will either proceed directly or authorize the court below to act.

In the case before us, the order appointing a receiver was superseded by the fiat of one of the Judges of this court. He granted the fiat upon the ground that the appeal, which was general, brought up the entire case, as it certainly did. The appellees might have tested the question of their right to a receiver either by moving to dismiss the *supersedeas*, as was done in *Merrill v. Elam* and *Hoge v. Hollister*, or by asking this court to execute the order of appointment. They did neither, but allowed the order to remain unexecuted. The only bond demandable from the appellant in this case, treating the appeal as bringing up the unexecuted order appointing a receiver, was a bond for costs. The fiat of the judge does not prescribe the conditions of the bond. The bond actually given under the order of *supersedeas* was broader, but its provisions beyond the requirements of the law and the fiat of the judge were not binding: *Ranning v. Reeves*, 2 Tenn. Ch., 263.

The decree below will be affirmed. The costs of this court and the chancery court will be paid by the next friend of the original complainant.

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11L	235
14L	17

ANDREW RENKERT v. JOSEPH ELLIOTT.

1. PLEADINGS AND PRACTICE *Bond, attachment.* The bond which is required upon suing out an attachment, and which the statute directs shall be made payable to the defendant, will enure to the benefit of each and all of several defendants who may be aggrieved, and among others to the benefit of the defendant whose property is attached as the property of the debtor, although the bond be made payable to one defendant named "*et al.*"
2. SAME. *Same.* If one defendant alone is aggrieved, he may sue in his own name avowing in his declaration that the other defendants had no interest in the damages claimed, or in the name of all of the defendants for his use, and the suit may be continued in his own name if the other plaintiffs die, or if, at the instance of his adversary, the trial court compels him so to do.
3. SAME. *Same.* Under attachment bond which follows the words of the statute, the obligors are liable to each defendant severally if each have a several interest, and the surety for each of his principals severally as well as jointly.
4. SAME. *Attachment. Penalty of bond.* An attachment sued out under the Code, sec. 4283, *et seq.*, is not a jurisdictional writ, and abides the event of the suit unless sooner discharged by the court. But such an attachment ought not to be discharged *in toto* for the failure to increase the penalty of the bond, but the levy should be reduced so as to be within the penalty.
5. SAME. *Attachment bond. State not required to give.* The State cannot be required to give an attachment bond, and no liability can be created on the part of persons purporting to execute a bond as sureties.
6. SAME. *Same. Damages.* Where an attachment bill has been filed by a creditor against his debtor, to reach property alleged to be held by a third person under a title fraudulent as to the creditor, the question whether the attachment was wrongfully sued out as to such person is not tested by a discharge of the attachment for the want of an increased bond, or by the dismissal of the suit at the cost of the defendants because the creditor's debt had been paid, or satisfied even by a compromise. In such a case, the question may be made in a suit for the damages occasioned by the wrongful suing out of the attachment.

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7. SAME. *Same. Exemplary damages.* In a suit on an attachment bond against a surety, the plaintiff is not entitled to recover exemplary damages unless the principal is fixed with malice, or a wrongful abuse of the process.
8. SAME. *Attachment. Damages. Surety on bond.* Since the adoption of the Code a suit for damages against a creditor for the wrongful suing out of an attachment is an action on the facts of the case, and the measure of damages is precisely the same as in a suit upon the attachment bond, malice and a want of probable cause going in aggravation, and a judgment in such a case on the merits in favor of the defendant is conclusive between the parties, and will enure to the benefit of the surety, and may be relied on as *res adjudicata*, under the general issue in an action upon the bond.

FROM SHELBY.

Appeal in error from the Circuit Court of Shelby county. . J. O. PIERCE, J.

W. M. RANDOLPH and WRIGHT, FOWLKS & WRIGHT
for Renkert.

. J. H. MALONE and GANTT & PATTERSON for Elliott.

COOPER, J., delivered the opinion of the court. .

Action upon attachment bond in which the verdict and judgment were in favor of the plaintiffs below, and the defendant appealed in error.

On March 27, 1874, the State of Tennessee and the county of Shelby filed a bill in the chancery court at Memphis against William Elliott, John D. Elliott and Joseph Elliott, under which they caused to be attached three steamboats as the property of William and John D. Elliott, although the title was in Joseph Elliott. The complainants had recovered large judgments,

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amounting to \$72,663.27, against one Wm. McLean as tax collector of Shelby county, and the sureties on his official bonds, among whom were William Elliott, John D. Elliott, Andrew Renkert and P. R. Bohlen. The bill sought, upon a return of *nulla bona*, to subject to the satisfaction of these judgments the steamboats, and charged that William and John D. Elliott were the owners of the said steamboats, the conveyance to their brother Joseph Elliott being merely colorable, and intended to hinder and delay their creditors. The bill prayed for writs of attachment and injunction to attach said boats, and enjoin their transfer. A *fiat* was granted by the chancellor in these words: "Upon complainant giving an injunction bond in the sum of one thousand dollars, and an attachment bond in the sum of ten thousand dollars, issue writs of attachment and injunction as prayed." The attachment bond given was as follows:

"We, the State of Tennessee and county of Shelby, and surety A. Renkert and P. R. Bohlen, acknowledge ourselves indebted to William Elliott *et al.* in the sum of ten thousand dollars, to be void if the said complainants, the State of Tennessee and county of Shelby, who have this day filed a bill in the first chancery court of Shelby county, praying an attachment thereon against the estate of said defendants, William Elliott *et al.*, for the sum of about \$72,663.27, and obtained the same upon the execution of this bond, shall prosecute the said attachment with effect, or, in case of failure, pay the defendants all costs which may be adjudged against complainants, and also

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all such damages as defendants may sustain by the wrongful suing out of the attachment. Witness our hands and seals this — day of —— 187 .

————— (Seal.)

A. RENKERT, (Seal.)

P. R. BOHLEN. (Seal.)

The attachment was issued and levied upon the three steamboats on the 28th and 30th of March, 1874. On June 9, of the same year an order was made on the county of Shelby to increase its attachment bond to the sum of \$25,000, which was followed in a few days by a further order to make the penalty of the bond \$37,500 within twenty days, otherwise the attachment would be dismissed. These orders not having been complied with, the court on July 7, 1874, made the following order: "It appearing that the county of Shelby has wholly failed to execute the attachment bond within the time required, it is therefore ordered, adjudged and decreed by the court that the attachment and injunction issued in this cause on behalf of the said county of Shelby be and the same are hereby dismissed and dissolved, and that said cause be only further prosecuted by said county of Shelby as though the bill was an original bill without the extraordinary process of attachment and injunction. And as to the State of Tennessee, the attachment and injunction are retained."

On April 1, 1874, the complainants filed a petition to have the steamboats sold as perishable property, and, in November 17, 1874, an order of sale was made accordingly. Under this order one of the boats was

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sold, and the sale confirmed. January 20, 1875, the Elliotts were permitted by the complainants to replevy the other steamboats upon their own bond without security, which was done. On February 24, 1875, the bill was taken for confessed against the Elliotts, but the order was set aside on June 29, 1875. The Elliotts then filed a joint answer admitting the recovery of judgments as claimed by the complainants, but denying the alleged fraud in relation to the steamboats. On September 6, 1876, there was filed in the cause a paper writing signed by the solicitor of Shelby county, written under the style of the case, as follows: "It appears that the defendants, William and John D. Elliott, have fully paid off their proportion of the defalcation of William McLean, former tax collector, and, consequently, under order of the county court passed at its January term, 1876, are entitled to be discharged from all further liability; this suit so far as the county is interested may be dismissed with costs."

A compromise had been entered into about January 20, 1876, by which each surety of McLean was permitted to release himself from further liability by paying his proportion of the judgments, after certain deductions, which compromise agreement was entered on the minutes of the county court and approved by the court. It seems probable also that William and John D. Elliott had paid their proportion on more of the judgments before that date, and even before the filing of the bill. There was a stipulation in the agreement of compromise that any excess of payment by a surety beyond his proportion was not to be refunded to him.

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On June 27, 1877, an order was entered in the chancery suit reciting that it appeared from the statement of the solicitor of the county on file that the liability of the defendants to the county had been paid, and that the cause should be dismissed, "it is therefore ordered, adjudged and decreed by the court that the suit be and is hereby dismissed at the defendants' cost so far as the interest of Shelby county is concerned." On February 22, 1878, the following order was made: "The defendants appear and produce in court the receipt of the comptroller whereby it appears that the parties liable with the said defendants in the judgments in favor of the State of Tennessee, described in the bill, have since the filing of the bill fully paid and satisfied the same, and therefore move the court to order the dismissal of the suit, and to adjudge the costs therefor against the plaintiff; it is therefore ordered, adjudged and decreed that the suit be and the same is hereby dismissed, and that the State of Tennessee recover of the defendants all the costs herein not disposed of by the former decrees, and that execution issue for the same."

On May 8, 1878, Joseph Elliott instituted two suits in the circuit court of Shelby county against the county of Shelby, Andrew Renkert and P. R. Bohlen to recover damages for the injury sustained by reason of the proceedings in the chancery case. One of these suits was an action on the facts of the case, and the other upon the attachment bond. In both suits, a *nol pros.* was entered by the plaintiff as to Bohlen, and a demurrer was sustained in favor of the county.

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Upon the trial of the action on the facts of the case, a verdict was rendered in favor of the defendant, Benkert. The other action is now before us.

This action upon the attachment bond was originally brought in the name of William Elliott, John D. Elliott and Joseph Elliott, for the use of Joseph Elliott. Upon the demurrer of the defendant the trial judge was of the opinion that the action should be in the name of the party aggrieved alone. For this reason, and because William and John D. Elliott were then dead, the action was so amended as to leave Joseph Elliott the sole plaintiff. In this attitude of the case, Benkert being the sole defendant, a trial was had, which resulted in a verdict in favor of the plaintiff for \$9,100.

The declaration is, perhaps, open to the criticism made that it does assign as a breach of the bond sued on that there was a failure to prosecute the chancery suit with effect. But it also claims damages for the wrongful suing out of the attachment. And, after verdict the declaration will be treated as making a defective statement of a good cause of action, and therefore sufficient.

The defenses relied on were made in one or more of several modes, namely, by demurrer to declaration, by plea, by objection to the admission of evidence, and by request for particular charges to the jury. The details of the case need not therefore be followed. It will be sufficient to notice the points made and discussed by counsel.

The attachment bond sued on is, it will be remem-

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bered, made payable to "William Elliott *et al.*" The first point insisted upon in defense is that Joseph Elliott is not named as payee, or entitled to sue on the bond. The argument in support of the position is based partly on the form of the bond, and partly on the assumption that an attachment bond is only intended to indemnify the persons whose property is sought to be attached. The statute which prescribes the form of an attachment bond directs that it shall be made payable to the "defendant": Code, sec. 3471. And it is not denied that, by an elementary rule of construction, the singular number used in a statute will include the plural where the word is intended to designate all of a class. The objection is that the words "*et al.*" has no definite meaning. But it might just as well be said that the letter "v," when found between the names of the plaintiff and defendant to a suit, has no meaning. The words in question, as abbreviation, are in common, and every day use in writs, pleadings, style of cases, and entries on the minutes and dockets of the court, and are known to mean "and another" or "and others," as the case may be. The law required the bond to be made payable to all of the defendants named in the bill, for the benefit of whom it might concern. The clerk, or other draftsman of the bond, made the bond payable to one of the defendants by name, and to the other defendants by the form of words usually adopted for the purpose. In a case in which this precise form of words was used, neither the court nor the counsel thought it necessary to allude to the fact:

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White v. Bowman, 10 Lea, 55. The bill of the State and county did not seek an attachment against the estate of William and George D. Elliott. It specified the three steamboats as property to be attached, and stated that Joseph Elliott claimed and held the title. If, in fact, these steamboats belonged to Joseph Elliott, he was beyond question the "defendant" most interested in the security intended to be furnished by the bond, and entitled to its benefits.

A more difficult question is in whose name, where there are several defendants, the action should be brought to recover damages for a breach of the bond. The statute undoubtedly intended that the bond should enure to the benefit of each and every defendant aggrieved by the suing out of the writ of attachment. If the defendants have all a common interest, as in the case of partners, the suit should, of course, be in the name of all of them. On the other hand, if only one of several defendants was in fact injured, it is equally clear he alone might sue. And in such a case, he might bring the suit in the name of all for his use, or in his own name with an averment that he only was aggrieved. Where there are several defendants, each of whom may be aggrieved in his own right, the question becomes more complicated, and the authorities are in conflict: Drake on Att., sec. 163. If each is allowed to sue for himself, the penalty of the bond might be exhausted in the first recovery, leaving the other parties without redress. To meet this difficulty, as well as to prevent a multiplicity of suits, the suit ought, it would seem, to be brought

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in the name of all, leaving the recovery to be divided among them as they might show themselves entitled. In this State, an action by one defendant has been sustained where the declaration averred that the other defendants had no interest in the particular damages claimed: *White v. Bowman*, 10 Lea, 55. In another case, it has been held that even the cause of action of one defendant might be split, and an assignee of the bond under a general assignment in bankruptcy of the defendant's estate might sue and recover for any injury to the property attached, while the defendant himself might recover for the injury to his business, reputation, and character by reason of the attachment of the same property, both being of course entitled to exemplary damages if the case be one for such damages: *Doll v. Cooper*, 9 Lea, 576. I was of opinion that such a splitting of actions was not in accord with the principles of common law, nor authorized by statute, and dissented from the latter ruling. No difficulty exists in the case before us. The suit was brought in the name of all the obligees for the use of the plaintiff, and the defendant cannot complain that the action is now in the name of the plaintiff alone. For the result has been brought about by his own action. It appears, moreover, that the other two plaintiffs are dead.

The attachment bond is conditioned for the payment of all such damages as defendant may sustain, and not in terms for the several damages of each defendant. But it does not follow, as contended for by the defendant's counsel, that the words only import the

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payment of the joint damages of all of the defendants. The bond follows the words of the statute except that it uses the plural instead of the singular number. The object of the statute, as we have seen, was to indemnify each defendant if each has a separate interest, as well as all of the defendants collectively if they have a joint interest. In like manner, where a person is a surety for more than one principal, it is the settled law of this State that he is bound for his principals severally as well as jointly: *Kelly v. Gordon*, 3 Head, 683; *McCabe v. Sutton*, 7 Lea, 248. The bond must be read by the light of the statute, and will be held to have been executed in accordance therewith, unless the language unmistakably expresses the contrary. The statute requires the bond to be executed by the plaintiff, his agent or attorney, and it may be a question whether a bond not thus executed would prevent the discharge of the attachment. But if not thus executed, the bond, being amendable, is voidable, not void, and if acted upon is binding on those who do execute it: *Drake on Att.*, sec. 150.

The breach of the bond is that the damages sustained by the defendants have not been paid if there has been a failure to prosecute the attachment, with effect. In the case of an original or ancillary attachment, the defense must be made generally by plea in abatement attacking the ground on which the attachment has been sued out. But a failure to successfully prosecute the cause of action might equally show that the attachment was wrongfully sued. The bill of the State and county in the case under consideration was

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a bill under the Code, sec. 4283, *et seq.*, to reach equitable assets of a judgment debtor in the hands of a third person under an alleged fraudulent conveyance or device. The attachment in such a case is not jurisdictional, but merely a writ to impound the property pending litigation. It takes the place of a writ of injunction, and the appointment of a receiver at common law. It is not what is called a writ of attachment at law upon the propriety of the issuance of which an issue may be made and tried independently. It abides the event of the principal litigation unless the court sees proper, upon good cause shown, to discharge it upon an application made for the purpose in the same way that an application may be made to dissolve an injunction or discharge a receiver. The penalty of the bond rested in the discretion of the chancellor: Code, sec. 4289. He had the right to demand a new bond with an additional penalty for the protection of the defendants, and to discharge the attachment for sufficient cause. What he should have done upon the failure of the county to give the additional bond required was not to discharge the attachment *in toto*, but to have reduced the levy of the attachment to so much of the property as was covered by the penalty of the bond originally given: Code, sec. 4451. But his action in discharging the attachment altogether, although erroneous, was not void. From that moment, as properly held by the circuit judge, the liability of the county and its sureties under the attachment bond necessarily ceased. The bond was clearly void as to the State as also

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held by the trial judge, and no liability on the part of the sureties was created thereby, for the obvious reason that there can be no surety without a principal.

The judgments on which the bill of the State and county was based were valid, subsisting judgments, and for a much larger amount than the payment then made therein, including the payments obtained by the sale of the property of William and John D. Elliott mentioned in their answer. The judgment creditors had the legal right to proceed against the property of any of the judgment debtors. The bill was therefore properly filed for the purpose of reaching the property and effects of these defendants, and, of course, the steamboats attached, if indeed they had an interest in them. The State and county had, however, no demand against Joseph Elliott, and their bill was wrongfully filed against him, and the attachment wrongfully sued out as to him unless his claim and title to the steamboats mentioned in the bill were in fact merely colorable. That question was in no way tested by the proceedings which eventuated in the order of the court discharging the attachment, or in the order itself. The inability or unwillingness of the county to give another bond was not in fact or in law a recognition of Joseph Elliott's title, nor was the order of the court an adjudication that the writ had been wrongfully sued out. The subsequent dismissal of the suit with the consent of the county court, because "William and John D. Elliott had paid off their proportion of the defalcation of McLean," would not on its face imply that the suit had not been successfully prose-

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cuted. Nor would the fact that the liability had been compromised pending the litigation upon the terms of each surety paying his proportion of the debt, and that the Elliotts had paid their share before suit was brought. For the county may have been induced to make the compromise by payments made by other sureties, and by motives of kindness to the debtors. There is not the least pretense that the judgments sued on were not valid judgments which could have been enforced against the defendants. On the other hand, the entry of dismissal could in no sense be considered a successful prosecution of the suit as against Joseph Elliott. Nor could it be said that he, as an obligee of the attachment bond, prevented the county from prosecuting the suit with effect because his co-obligee compromised the debt sued on with the county. The suit was necessarily terminated by a satisfaction in any way by the debtors of the complainant's debt, and could not be retained to try the abstract question of the colorable or real character of Joseph Elliott's claim to the property attached. And if the compromise upon such favorable terms to the debtors might be considered as suggesting a doubt on the part of the complainants of the justice of their claim against Joseph Elliott, the acquiescence of the latter in a judgment against him for the costs would indicate that he himself did not feel altogether secure in his claim. The trial judge was right therefore, in treating the question as an open one, not settled by the original suit, and to be determined in the action on the bond.

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The action being upon the bond, the trial judge told the jury properly that the liability of the defendant Renkert was exclusively as surety for the county, and that he would only be liable for such damages as could be recovered against his principal. These damages his Honor said must be the natural, proximate, legal result or consequence of the suing out of the attachment. "In addition," he said, "if the jury find that the attachment was sued out either with malice or ill feeling towards the defendant, Joseph Elliott, or that it was done so recklessly as to indicate a willful or wanton disregard of the rights of the plaintiff, then the jury might give exemplary damages." There is not the least testimony in the record to show that the county or its officers were actuated by malice towards Elliott, or that the levy of the attachment was made in a wanton or reckless manner. The counsel of the defendant in error have not seriously insisted upon the correctness of this part of the charge. They contend that it is clear from the evidence that the jury gave only actual, and not exemplary damages. The attachment was levied on the last days of March and discharged upon the 7th of the following July, a few days over two months. The verdict seems to be rather large for the actual damages by detention for that period, the property being in *custodia legis*.

Another serious question arises upon one of the rulings of the trial judge on the admission of evidence. It will be remembered that on the very day this action was commenced, Joseph Elliott brought

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another suit against the county of Shelby and Andrew Renkert to recover damages for the same cause. This suit resulted in favor of the county upon demurrer to the merits, and in favor of Renkert upon trial by the verdict of a jury. The judgment was a bar to another action between the parties: *Parks v. Clift*, 9 Lea, 524. The record of this suit was offered as evidence by the defendant under the general issue to show a former adjudication of the same matters, and was rejected by the court. The record shows that the action was on the facts of the case. The first count alleged that the original bill was filed and the attachment sued out maliciously and without probable cause. The second count was for the wrongful filing of the bill and suing out of the writ. The other two counts were a repetition of these with the addition that the defendants combined and confederated with the State of Tennessee and P. R. Bohlen to sue.

A former judgment may be shown in evidence under the general issue, as well as pleaded in bar, and is equally conclusive: *Warwick v. Underwood*, 3 Head, 338: 1 Gr. Ev., secs. 530, 531; Freeman on Judgments, sec. 284. It has also been held by this court, that where suit is brought against a surety for a debt from which the principal has been discharged by a court of competent jurisdiction, the surety is entitled, upon proof of the fact of valid discharge, to rely upon the judgment of discharge as an estoppel either at law or in equity; and that this must be regarded as an exception to the general rule of *res inter alias acta*: *Gill v. Morris*, 11 Heis., 614.

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The county was discharged from all liability to the present plaintiff for the cause of action then sued upon. And the question is whether the discharge, there being no doubt of the validity of the proceedings, enures to the benefit of the surety.

The suit was against the county of Shelby and the present defendant, but, except upon the counts charging a confederacy, it was several as to each defendant, and a several judgment might have been rendered: Code, sec. 2972. It has been uniformly held by the courts that the remedy of a defendant for a wrongful attachment by an action for a malicious prosecution is not affected by the execution of an attachment bond: Drake on Att., sec. 154. Our cases are in accord: *Smith v. Story*, 4 Hum., 169; *Smith v. Eakin*, 2 Sneed, 456. It was plainly the opinion of the court in these cases that the common law action thus reserved was the action for malicious prosecution, in which it was necessary to prove both malice and a want of probable cause. And that view was followed in *Sloan v. McCracken*, 7 Lea, 626, although not essential to the point actually ruled. But these early cases were decided when the old system of forms of action was still in force. The limitation of actions, and other rights were defended upon these forms, and rigid adherence to them required. The Code abolished the system, and, in effect, allowed all actions, either in tort or contract, to be brought upon the facts of the case: Code, sec. 2746, *et seq.* A party aggrieved by the wrongful suing out of an attachment is entitled to recover damages therefor. He may sue the attach-

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ing creditor for these damages either on the bond, if the creditor has signed it as an obligor, or on the facts of the case. The latter is perhaps his only remedy, if the creditor is not a party to the bond. In both cases the action is really on the facts of the case, and the measure of damages precisely the same, the damages on the bond being limited by the penalty: *Jennings v. Joiner*, 1 Cold., 645; *Doll v. Cooper*, 9 Lea, 574. Malice and want of probable cause go, in both cases, in aggravation of damages. The weight of authority sustains these views, the decisions in this State being treated as exceptional: Drake on Att., sec. 158.

The reason for the rulings is that the expression of legislative will, in designating the terms of the attachment bond, plainly indicates that the mere wrongful recourse to the process of attachment is a sufficient cause of action, and that malice is important only in connection with the question of damages. If it were otherwise, and the attaching creditor had failed as in the present case to go upon the bond, and the surety had become insolvent, the aggrieved party might perhaps have no remedy against the principal unless he could show both malice and want of probable cause, which would be contrary to the express object of the statute. And at any rate the party has his election to sue on the bonds or the facts, and would be equally concluded by the judgment. Accordingly, in a recent case at Memphis, where the injured party sued the attaching creditor in the Federal Court upon the facts of the case, Judge Hammond held that he

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could recover the actual damages sustained, whether there was any malice and want of probable cause or not: *Jerman v. Stewart*, 12 Fed. Rep., 266.

In this view, the discharge of the county in the suit on the facts of the case enured to the benefit of the surety as *res adjudicata*, and the trial judge erred in excluding the record of that suit from the jury.

The judgment must be reversed, and the cause remanded for further proceedings.

The case of Shelby county v. Renkert shares the fate of this case, and is reversed and remanded.

FRAZIER v. BROWNING.

CHANCERY JURISDICTION. *Ejectment*. By the act of 1877, ch. 97, the chancery court has the same jurisdiction as the circuit court in all cases of ejectment for land. The fact that the land is of less value than fifty dollars does not deprive the chancery court of jurisdiction.

FROM GIBSON.

Appeal from the Chancery Court at Trenton. JOHN SOMERS, Ch.

T. E. HARWOOD for Kelton.

CALDWELL & CALDWELL for Taylor.

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FREEMAN, J., delivered the opinion of the court.

This bill is filed, October, 1879, to enjoin the execution of a writ of possession in an action of forcible entry and detainer, in which defendant had recovered possession of part of about one acre of land from complainant, and seeks also to have complainant's title declared to the whole of the one acre, or thereabouts, in dispute between the parties.

We have carefully examined the record, and without discussion at large, give our conclusions.

Before doing so, however, it is proper to dispose of a question of law presented by a plea in abatement filed by defendant. This plea raises the question, whether the chancery court has jurisdiction of the subject-matter, by averring that the matter in controversy is not of the value of fifty dollars.

It is now, after some fluctuation, the settled rule of this court that the court of chancery has not jurisdiction in ordinary cases where the matter is less than fifty dollars, sections 4280 and 4281 being distinct and clear on this question. See *Malone v. Dean*, 9 Lea, 336. But by the act of 1877, ch. 97, p. 119, to increase the jurisdiction of the chancery court, it is enacted, "that jurisdiction of all civil causes of action now triable in the circuit court, except for injuries to person, property or character, involving unliquidated damages, are hereby conferred upon the chancery court, which shall have and exercise concurrent jurisdiction thereof along with the circuit court." By Code, sec. 4230, the circuit courts have

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jurisdiction concurrent with justices to the extent of the jurisdiction of the latter, of all debts and demands on contract over fifty dollars; and by the general provisions of the Code regulating the action of ejectment, that court had jurisdiction in all cases of ejectment for land. It is certain the circuit court could have tried and determined the title involved in this case. It is not excluded by the limitation cited, this not being a debt or demand on contract, but a suit for the recovery of possession of land, after an adjudication of the title. It is, in fact, an ejectment bill, or an action of ejectment in the chancery court. This being so, the court of chancery, by the act of 1877, has the same jurisdiction as the circuit court. The matter being of legal cognizance, the chancery court, by this act, has concurrent jurisdiction with the court of law in such a case. The case of *Malone v. Dean* was a bill to enforce a vendor's lien, a matter of purely equitable jurisdiction, and not affected by the act of 1877.

* * * * *

Upon the facts, the chancellor's decree is reversed, and the bill dismissed.

Glenn v. Moore.

JOHN C. GLENN v. WILLIAM MOORE *et al.*

CHANCERY COURT JURISDICTION. *Unliquidated damages.* An officer to satisfy an execution levied upon some wheat, a *supersedeas* from the circuit court issued. The clerk took insufficient bond; wheat was released by the officer, and disposed of by the debtor, who was insolvent. Upon bill in chancery court to hold the clerk and sureties upon his official bond liable for the value of the wheat, upon demurrer for want of jurisdiction in the chancery court. *Held:* That the action was not for "unliquidated damages," and that the chancery court had jurisdiction.

FROM GIBSON.

Appeal from the Chancery Court at Trenton. JOHN SOMERS, Ch.

M. M. NEIL and MCFARLAND & BOBBITT for complainant.

SPL. HILL and McDEARMON & TYREE for defendants.

COOKE, Sp. J., delivered the opinion of the court.

The complainant recovered a judgment before a justice of the peace of Gibson county against one Davidson for about \$220, upon which execution was issued and levied upon some 230 bushels of wheat. Davidson preferred a petition to the circuit judge, and obtained a *fiat* directed to the clerk of the circuit court ordering a *supersedeas* to issue, to supersede said execution, upon the petitioner executing bond with security as required by law.

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The respondent, William Moore, who was the clerk of the circuit court, carelessly and negligently and in violation of his duty as such clerk, took an unauthorized and insufficient bond, with insolvent security, and issued the *supersedeas*, by virtue of which the wheat was released by the officer making the levy, and disposed of by Davidson, who was insolvent.

The petition for *supersedeas* was dismissed by the circuit court, and this bill has been filed against the clerk, William Moore, and the other respondents, who are his sureties upon his official bond, seeking to have an account of the amount and value of the wheat so levied upon and released, and a decree for the same, upon the ground of the failure of said Moore to discharge his duty as such clerk according to law and the requirements of his official bond, by not taking and requiring a good and sufficient bond, with solvent and responsible sureties, before issuing said *supersedeas*.

There was a demurrer to the bill, which was overruled, and the respondents required to answer. Proof was taken, and account was ordered according to the prayer of the bill, as to the amount and value of the wheat levied upon and released, and a report in obedience thereto by the master, which was confirmed, and a decree rendered against the respondents for the amount so ascertained, from which they, or some of them, have appealed to this court.

The only question which is now insisted upon was raised by the demurrer, the cause of demurrer

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assigned being "that a court of equity has no jurisdiction of the subject-matter of this bill, the same being only cognizable at law," etc.

This raises the question as to whether this case falls within the exceptions of the act of 1877, ch. 97, entitled an act to increase the jurisdiction of the chancery court, the second section of which act is as follows: "That from and after the passage of this act, no demurrer for want of jurisdiction of the cause of action shall be sustained in the chancery court except in cases of unliquidated damages for injuries to person, property or character."

The facts of this case do not bring it within the above exception, or constitute an injury to property within the meaning of said act. By the levy of the execution the title to the specific property was vested in the officer for the satisfaction of the judgment. By reason of the failure of the clerk to discharge his official duty, it was released and lost, and by virtue of the obligatory force of his official bond, the complainant became entitled to recover of him and his sureties, the respondents in this cause, the value of the wheat, and which might, under the provisions of said act, be sued for and recovered in a court of chancery.

This case is very easily distinguishable in its facts from the case of *Ramsey v. Temple*, 3 Lea, 252. Here the liability was fixed, and the complainant's right to recover of the defendants the value of the specific property was clear; and a court of chancery and the mode of procedure therein was well adapted

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to the ascertainment of that value. None of the *inconveniences* or objections to the jurisdiction pointed out or suggested in that case can apply to this, and that case went to the utmost verge of legitimate judicial construction, and we cannot extend it further.

The demurrer was properly overruled. There is no error in the decree of the chancellor, and it will be affirmed with costs.

J. D. McCUTCHIN v. R. Z. TAYLOR.

1. EMPLOYER AND EMPLOYEE. *Contract.* An agreement to give a part of the crop in consideration of the labor of tillage is as much a hiring as an undertaking to pay in money.
2. SAME. *Damages.* Upon a suit for decoying away hands under such an agreement, in estimating the damages it will be competent to look to everything resulting from the loss of labor such as the reasonable cost of procuring other labor; the damage to crops from delay in planting or failure to work them, and such kindred damages as plaintiff by reasonable diligence could not have prevented.

FROM GIBSON.

Appeal in error from the Law Court at Humboldt. J. T. CARTHEL, J.

JOHN S. COOPER for McCutchin.

W. C. CALDWELL and S. H. WILLIAMS for Taylor.

McCutchin v. Taylor.

TURNEY, J., delivered the opinion of the court.

McCutchin sues Taylor for damages "for decoying from him certain hands," etc. The proof shows that McCutchin had contracted with certain negroes to cultivate certain lands for the year 1878. The crop to be divided. It is insisted that Taylor hired or enticed the negroes to leave McCutchin in violation of chapter 93 of the act of 1875.

There was verdict and judgment for McCutchin. Taylor appeals and insists that the negroes were not in the employ of McCutchin, in the sense of the statute. That the statute is applicable to contracts for personal service only. The language is: "That hereafter it shall not be lawful for any person in this State, knowingly to him, to contract with, decoy or entice away, directly or indirectly any one, male or female, who is at the time under contract or in the employ of another."

The second section provides: "That any person violating the provisions of the first clause of the first section of this act, shall be liable to the party who had originally had and was entitled to the services of said employee, by virtue of a previous contract, such damages as he may reasonably sustain by the loss of the labor of said employee," etc.

If it be admitted as insisted that the statute is only applicable to contracts for personal service, the case comes within it. The substance of the proof is, McCutchin wanted them to cultivate his land. He contracted with the negroes to do it. He was to superintend and direct.

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The agreement to give a part of the crop in consideration of the labor of tillage, is as much a hiring as an undertaking to pay in money.

We know the land owners of the country are in the habit of procuring labor by such arrangements. Many of them are unable to pay a money consideration for labor. A part of the crop is a substitute for money.

The court charged the jury that the measure of damages, if it be for the plaintiff, would be the reasonable rental value of the lands, team, tools, etc., which the plaintiff had agreed to furnish and which he necessarily lost by reason of the employee's failure.

This was error. The second section of the act gives such damages as the person may reasonably sustain by the loss of the labor of the employee, etc.

In estimating the damages it will be competent to look to every thing resulting from the loss of labor, such as the reasonable cost of procuring other labor; the damages resulting to crops from delay in planting, or if planted, from failure to work them, or such kindred damages as the plaintiff could not by reasonable diligence have prevented, and which would not have accrued but for the bad faith of the defendant.

Reversed.

Wheatley v. The State.

W. A. WHEATLEY v. THE STATE.

ATTORNEY. *Service on jury.* A person who has license as an attorney, but who does not follow the business of the profession of law as his avocation or calling, is not exempt from serving on the jury.

FROM SHELBY.

Appeal in error from the Criminal Court of Shelby county. L. B. HORRIGAN, J.

S. P. WALKER for Wheatley.

ATTORNEY-GENERAL LEA for the State.

FREEMAN, J. delivered the opinion of the court.

Wheatley was regularly summoned to serve on the jury for the criminal court of Shelby county. The record shows he refused to serve and was fined \$25 by the criminal judge, from which judgment he has appealed in error to this court.

Wheatley claimed to be exempt from jury service on the ground that he was a practicing attorney, duly licensed.

The facts are that he had been licensed to practice law about ten years before that time, but he had gone into the "real estate agency business" as his regular avocation, that is to say, "renting houses and plantations, buying and selling real estate," etc. He stated in his testimony that he often attended to suits before magistrates in business connected with his office,

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such as bringing suit upon rent notes, and for possession of real estate, but only where it grew out of the business of his office as real estate agent. He does not solicit as a lawyer, and the sign for his office is "real estate agent." When such suits as are mentioned above are appealed to the circuit court he does not follow them.

On these facts the question is whether section 4005 of the Code exempts the party from serving on juries? The language of the section is: "The following persons are exempt from liability to act as jurors; all persons holding office under the laws of the United States, or of this State, all *practicing* attorneys, physicians and clergymen, all acting professors or teachers of any college, school," etc.

We think it beyond question the plaintiff in error is not a practicing attorney. He is an attorney nominally, and so the statute contemplates he may be, and yet subject to jury duty, but is not a practicing attorney, that is a party who follows the business of the profession of the law as his avocation or calling. The avocation of this party is that of a real estate agent, and this business he does solicit, or seek, and by it makes his living. It is not even said by him that he charges fees for attending to the cases incidently growing out of real estate business. Be this as it may, such business is a mere incident to the real estate agency, and what any agent might do as well as an attorney at law, we take it.

The result is the judgment will be affirmed.

Kelton v. Taylor & Co.

11L 984 4pi 654

WILSON KELTON v. B. M. TAYLOR & Co.

1. BAILMENT. *Usage of trade. Evidence.* It is competent to show the usage of trade to qualify a bailee's liability.
2. SAME. *Bailee. Liability.* A person to whom cotton is delivered to be ginned will be held, as bailee, to ordinary diligence only.

FROM GIBSON.

Appeal from the Circuit Court of Gibson county.
J. T. CARTEL, J.

T. E. HARWOOD for Kelton.

M. M. NEIL, W. C. CALDWELL and S. H. WILLIAMS for Taylor.

DEADERICK, C. J., delivered the opinion of the court.

Verdict and judgment were rendered in the circuit court for defendants, and the plaintiff has appealed in error to this court.

In 1876 defendants were operating a cotton gin in or near Trenton, ginning cotton for their customers and the public, and had been so engaged for several years. In the fall of that year the plaintiff delivered to them about enough cotton in the seed to make one bale, to be ginned for him. The cotton was ginned, baled and marked in the plaintiff's name, and placed under a shed, in the gin lot, ready for delivery. It appears that it was delivered at

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the gin on Monday, and plaintiff was informed that he could get the cotton next day, and on Tuesday, about 12 o'clock, after the cotton was ginned and baled, the plaintiff was informed by defendants' agent that the cotton was ginned and baled and ready for him, and he told the clerk to get one of the defendants to sell it for him; but this request was not communicated to defendants. On Saturday of the same week it was discovered that the cotton had been removed, and it could not be found. The gin lot was enclosed, and some of the hands lived in a house upon the lot. The plaintiff brought this suit to recover the value of the lost bale of cotton.

The grounds upon which plaintiff seeks a reversal of the judgment are, because of the improper admission of evidence and errors in the charge, and in refusing to charge as requested.

The court allowed defendants to prove that it was the usage of ginners of cotton in Gibson county, after they had ginned, baled and marked the cotton of their customers, to store it, as was done by them, and that plaintiff had had his cotton ginned at their gin for four successive years, and knew this was their custom.

We do not think there was any error in this. It is admissible to show the course of business in a particular trade. And a bailee is not expected or required to take the same care of a "bag of oats as of a bag of gold; of a bale of cotton as of a box of diamonds."

If in the course of a particular trade, certain

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goods, as coal, are usually left on a wharf, without guard, during the night, the bailee might not be responsible, although for other goods he might: Story on Bailments, secs. 14 and 15; 1 Gr. Ev., 292, 294; 5 Sneed, 681.

If, therefore, the usages of trade qualify the bailee's liability, it is competent to prove such usage. But it is argued that the court should have applied stricter care and more diligence to a ginner in the town of Trenton than to one in the country. We do not see that the record discloses that there would be greater danger of loss in the one case than in the other. If any difference, perhaps the quiet of the country would offer safer opportunity to thieves, and less danger of detection of the theft.

It is also insisted that the court erred in holding that the bailee was held to ordinary diligence only.

This is a case in which the bailee was to do some work and bestow some care upon the thing bailed, and in such cases he is only held to ordinary diligence. But what would be ordinary diligence or care in respect to a bag of oats or a bale of cotton, might be gross negligence as to a bag of gold or a box of diamonds: 2 Parsons on C., 130; Story on B., sec. 429.

As to the instructions asked by plaintiff, the court had already instructed the jury as asked in regard to the bailee's liability, and the burden of proof on him to show good reason for not delivering the cotton. He told the jury that defendants could not relieve themselves from liability if they had dis-

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posed of the cotton or delivered to another, by mistake or otherwise, but if it was stolen without their fault it would excuse them.

There was evidence to show that no mistake was made in its delivery to the wrong person by defendants, and from the evidence the jury concluded it was stolen, and we think the evidence justified their conclusion.

There is no error in the judgment, and it will be affirmed.

S. R. LATTA v. GEORGE W. PIERCE.

RENTS. Sale of land. Upon a sale of land by the chancery court the purchaser is entitled to rent from the time when the right of possession attaches. If the decree of confirmation postpones the possession of the purchaser, he will not be entitled to rent from confirmation, but from right to possession.

FROM DYER.

Appeal in error from the Circuit Court of Dyer county. J. T. CARTHEL, J.

A. W. CAMPBELL and LATTA & MARSHALL for Latta.

C. C. MOSS for Pierce.

FREEMAN, J., delivered the opinion of the court.

At a sale of the land of C. C. Moss, made under

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a decree of the chancery court at Dyersburg, in August, 1879, S. R. Latta became the purchaser. The sale was reported to the court by the clerk and master, and confirmed on the 23d of October, 1879. The title was divested out of Moss and vested in the purchaser, "and it was further ordered and decreed, if necessary, that after the 25th of December, 1879, a writ of possession issue, to the end that said purchaser be put in possession of the land."

It further appears, that at the beginning of the year 1879, Moss being in possession of the land had rented thirty acres of it to defendant Pierce, who was entitled to possession as such tenant until the 25th of December, 1879. Pierce paid Moss the rent agreed on between them for the year in November, 1879. It does not appear at what time the rent was due by the terms of the contract between Moss and Pierce.

Latta, in February, 1880, brought this suit against Pierce, claiming the right to recover the rent of the land for the year 1879, as not being due at the time of his purchase, and therefore going to him as purchaser.

The case was tried by the court without the intervention of a jury, and a judgment rendered for the defendant, from which there is an appeal in error to this court.

In a case like this, *Mays v. McMickel*, at this place, in 1871, we held that "it is only when the title is vested by confirmation that the purchaser is entitled to possession, and the claim of rent arose when the right of possession attaches."

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We had substantially held the same principle in the case of *Armstrong v. McClure & Martin*, 4 Heis., 80, and subsequently in the case of *Ellis v. Foster*, 6 Heis., 131, 137, saying, in the latter case, it was the better practice for the court in such case to fix in the decree the right to rents accruing after confirmation.

We hold in accord with the principle of these cases, that the purchaser was only entitled to the rents from the time his right of possession accrued under the decree fixing his title, and that, having taken a decree fixing that right after the end of the year's renting, he was not entitled to recover any rent in this case, as held by his Honor, the circuit judge. Under the cases cited, he would have been entitled probably to the rents actually arising after confirmation of the purchase, had not the decree itself postponed his right of possession. The rent well might have been apportioned in this way, it being a case of rent *eo nomine*, no note having been given for the same by the tenant.

The judgment of the circuit court will be affirmed.

Railroad v. Neal.

LOUISVILLE & NASHVILLE RAILROAD COMPANY v. P.
M. NEAL.

LIMITATIONS, STATUTE OF. *Actions.* An action against a railroad company for damages for failure to deliver cotton to commission merchant as per contract is not barred within six years.

FROM CROCKETT.

Appeal in error from the Circuit Court of Crockett county. J. T. CARTEL, J.

H. B. FOLK for Railroad Company.

POWELL & BIGGS for Neal.

FREEMAN, J., delivered the opinion of the court.

This suit is brought to recover, to use the language of the warrant, in a plea of damages of three hundred dollars for failure to deliver one bale of cotton to Mosby, Hunt & Co. as per contract.

The facts are that the plaintiff delivered this bale of cotton with several others to the railroad agent, who gave receipt of the company, to be shipped to Mosby, Hunt & Co., of Memphis, Tenn. The cotton was not shipped, but probably stolen from the platform, no watchman or guard being kept over it while on the platform after delivery.

The only question contested is, whether the statute of limitations bars plaintiff's claim. If the statute of

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three years applies to the case as presented, it is conceded the suit cannot be maintained. If six years, it is then conceded the action can be sustained, and the defendant is liable.

This is not an action for injury to personal property, nor for detention or conversion of the same, which is barred in three years by sec. 2773 of the Code. It is for damages, or for breach of the contract to ship the cotton to Mosby, Hunt & Co., and comes under sec. 2775; "actions on contracts, not otherwise provided for, shall be barred within six years."

His Honor held this to be the period when the bar attached, and we affirm his judgment.

I. N. MORRIS v. MRS. A. C. NEVILLE.

EMPLOYER AND EMPLOYEE. *Damages.* Mrs. Neville sued Morris for keeping from her service certain employees with whom she had contracted for service. Upon trial, it was not error in the trial judge to refuse to charge "that if before Morris employed the laborers, or any of them, they had voluntarily broken their contract with plaintiff, with or without cause, then they would not be under contract with her, or in her employ, and Morris, in hiring them, would not be liable to plaintiff for damages."

FROM SHELBY.

Appeal in error from the Circuit Court of Shelby county. J. O. PIERCE, J.

Morris v. Neville.

A. SUGGS for Morris.

H. M. HILL and J. E. BIGELOW for Neville.

DEADERICK, C. J., delivered the opinion of the court.

Judgment was rendered by a justice of the peace of Shelby county in favor of plaintiff in error, and defendant in error, who brought the suit, appealed to the circuit court. There verdict and judgment were in her favor, and Morris has appealed to this court.

The suit was brought by Mrs. Neville, under the act of 1875, ch. 93, to recover damages for decoying and enticing away and keeping from her service certain employees with whom she had contracted for service, etc.

The plaintiff and her daughter and other witnesses make out a case entitling her to a recovery, under the act. Section 1 declares that it shall not be lawful for any one knowingly to hire, contract with, decoy or entice away, directly or indirectly, any one, male or female, who is at the time under contract or in the employ of another.

And section 2 provides that any one violating the provisions of the first section of this act shall be liable to the party who originally had, and was entitled to, the services of said employee, by virtue of a previous contract, such damages as he may reasonably sustain by the loss of labor of said employee; and he shall be liable, whether he had or not, knowledge of the contract, if he failed to discharge the person hired after notice of such contract.

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The defendant's testimony is in direct conflict with much of the material testimony of plaintiffs; but as the jury have passed upon this conflict of the evidence, we cannot reverse, even if we were of opinion that the weight of evidence was against the finding.

It is next insisted that the court erred in refusing to charge the jury, as requested, "that if before Morris employed these laborers, or any of them, they had voluntarily broken their contract with plaintiff, with or without cause, then they would not be under contract with her, or in her employ, and Morris, in hiring them, would not be liable to plaintiff for damages."

The court declined to give these instructions, stating that the statute was designed to cover such a case. The laborers had removed from the plantation of plaintiff directly to that of defendant, in the month of May, after having put in a crop of about thirty-five or forty acres of cotton and eight or ten of corn. The statute makes the hirer liable to damages, even if he has hired without knowledge of the previous contract of hire, if he fails to discharge the laborer after he has been notified that the person is under contract, or has violated his contract.

There was, therefore, no error in the refusal of the court to give the charge requested.

The judgment of the circuit court must be affirmed.

Conley & Harrison v. Deere, Mansure & Co.

CONLEY & HARRISON v. DEERE, MANSURE & CO.

PLEADINGS AND PRACTICE. *Replevin. Receiver.* A creditor obtained a judgment in circuit court against Bryant & Newhouse, and execution was issued thereon. The goods of Bryant & Newhouse were then attached by bill in chancery court, and a receiver appointed. The officer levied the execution upon the goods, and the receiver brought an action of replevin in circuit court to recover possession. *Held:* That under the facts of this case, the dignity of the chancery court, within the same jurisdiction, cannot be asserted by an action of replevin in a common law court, against a party having in fact a superior right to the possession of the property.

FROM GIBSON.

Appeal in error from the Circuit Court of Gibson county. J. T. CARTHELL, J.

W. M. McCALL for Conley & Harrison.

COOPER & BUCHANAN and WALKER for Deere, Mansure & Co.

FREEMAN, J., delivered the opinion of the court.

At the November term of the circuit court defendants recovered a judgment against Bryant & Newhouse. After the recovery of said judgment, Bryant & Newhouse sold one-third of the stock to McNeal, after which sale the style of the firm was Bryant, Newhouse & McNeal.

An execution issued on the above judgment, which was levied on goods owned by Bryant & Newhouse at the time of the rendition of the judgment, the levy being of date January 12, 1881.

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Before this time, however, the goods had been sold by Bryant, Newhouse & McNeal to Conley & Harrison. After this purchase several creditors had filed attachment bills, attaching these goods for debts of the former firm, under which proceedings Conley & Harrison had been appointed receivers, and placed in possession and control of the stock.

Upon the levy of the execution, the plaintiffs, as receivers, brought this action of replevin to recover possession of the property.

The sole title asserted is that of receivers, in this record, and the theory of the plaintiffs is, that the levy was an infringement upon the jurisdiction of the chancery court and a violation of its custody of property under its control, therefore wrongful, and they entitled to be restored by this proceeding to their possession.

His Honor, the circuit judge, sustained the contention of the plaintiffs, and gave judgment in their favor, from which an appeal, in the nature of a writ of error, is prosecuted to this court.

The question urged in argument, that the receiver cannot sustain this action because he does not show any authority from the chancery court to sue, is one not raised in the record. There was no objection taken in the court below on this ground, and if the point had been made, it may be that authority would have been shown. It suffices, however, to say, that the question not having been made on the hearing below, cannot now be assigned for error in this court. The general rule beyond question is, that a

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receiver is not at liberty to bring or defend actions, or lay out money, unless by special leave of the court: Story Eq. Jur., vol. 2, sec. 833a.

It is equally well settled, that the possession of the receiver is deemed the possession of the court; and the court will not permit itself to be made a suitor in a court of law. "The proper and usual mode adopted under such circumstances," says Judge Story, Eq. Jur., sec 833a, "is for the party claiming an adverse interest to apply to the court to be permitted to come in, and be examined *pro interesse suo*. He is then permitted to go before the master and state his title, upon which he may have the judgment of the master, and ultimately, if necessary, that of the court."

With us the matter would be referred to the master for report on the facts constituting the claim of the party, upon which report the court would take proper action and make the proper decree, the master in our State not having the *quasi* judicial powers appertaining to that office in the court of chancery in England, the rule of which is given in the above extract from Judge Story.

Conceding all this, the question is, what is the remedy, and whether, under the facts of this case, the dignity of the court of chancery, within the same jurisdiction, can be asserted by an action in a common law court, by replevin, against a party having in fact and law the superior right to the possession of the property?

In the case of *Cagill v. Woolridge et al.*, 8 Baxt.,

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580, we held that a receiver appointed by a court in Arkansas, who had shipped cotton taken possession of by him under the order of the court, to Memphis for sale—said shipment made in pursuance of the order of appointment—might, as against a party to that suit, who attached the property in Tennessee, maintain replevin in our courts and assert his right to the possession of the property. We have no doubt of the correctness of that holding. But it is seen from the opinion of Judge McFarland in that case, that he cautiously limits the ruling to the precise case in hand, saying that “beyond doubt this would give to the receiver against the parties to the litigation, and those claiming through them, a special property and right of possession that would maintain an action of replevin, and this right would not be lost by sending the property into the State”: 8 Baxt., 583.

But that is not this case. The defendants are not parties to the litigation in which the receiver was appointed, but judgment creditors, with an execution and a prior lien upon the property upon which it has been levied, and as such—the proceedings in chancery out of the way—have the superior title. It is not a proceeding in the chancery court to assert its jurisdiction, maintain its dignity, and punish by contempt a party who has infringed upon the rights and dignity of the court, but a party asserting in a court of law a superior right to the possession of the property, as against another who has himself appropriated it by virtue of a claim of right.

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The duties and rights of a receiver in possession of property under the orders of a court are well stated by the Supreme Court of Maine, in the case of *Morrill et al. v. Noyes, receiver*, Am. Law Reg., vol. 3, p. 21: "After the receiver has taken possession of the property, any person claiming it or any interest therein, may present his claim to the court. He may be made a party to the suit in order to establish his claim, or he may, by express permission of the court, bring a suit for the possession, care being taken to protect the receiver. But the receiver will not be ordered to deliver the property to the claimant until his right is established in one of these modes. Nor can any claimant bring a suit against the receiver, except by leave of the court, without being liable for contempt, if the property is part of the subject-matter in controversy. For this is cited: 3 Dan. Ch. Pr., 1972; 7 Paige, 573, and other cases.

This is all clear and well settled law; but it is seen that all these authorities go on the theory that the court appointing the receiver is to vindicate its authority, and the remedy is by proceedings as for contempt against the party infringing upon its dignity. See, also, the case of *Day, etc.*, 34 Wis.; Am. Law Reg., 13 vol., 782. And so it was said by Chancellor Walworth in *Parker v. Brouning*, 8 Paige, note to above case by Judge Redfield, that it was the established practice of a court of chancery, where the property is legally and properly in the hands of a receiver, to protect that possession, not

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only against acts of violence, but also against suits at law.

It is seen that this is stated, and correctly, too, to be a matter of chancery practice, and is the established rule for the action of that court.

But this does not sustain the proposition that it is the rule of law for the control of a court of law when a suit is brought in that court to assert the possession of the receiver. It might well have been, had the case been presented by the receiver to the chancery court, and the party have gone into that court on his present claim, that court would have ordered the property delivered to the present claimants. In fact, it would have done so inevitably in this case on the facts of this record. We do not think a court of law should arbitrarily proceed to re-deliver the property to the receiver, when the defendants' superior right is so clear that it is certain the court of chancery would not have done so. In other words, that a court of law shall be called on to assert and vindicate the dignity and jurisdiction of the court of chancery in an action of replevin in a case like the present.

It is evident that the whole theory of plaintiffs rests on the assumption alone that the violation of the rights of the chancery court gives him a right of recovery in the law court. The law court is called upon to redress the wrong done to the jurisdiction and dignity of the co-ordinate court of equity. We do not think, in a case like this, that a legal right, as against one having a lien fixed on the

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property, which he would have been able to maintain in the chancery court, can be sustained in a court of law. We confine our decision strictly to the case made in the record before us, deciding nothing as to the rights of a mere trespasser, or one who comes even in a court of law merely to subject the property to the payment of a debt, having no lien or legal priority fixed on the property by the judgment or process of a court of competent jurisdiction.

We need but add, that the contention of defendants, that the property was in *custodia legis*, or under the control of the law court, by virtue of the lien of the execution, could not be sustained. The facts simply gave a lien on the property, that is, a right of priority of appropriation in payment of his judgment as against a subsequent purchaser or holder during the existence of said lien.

The result is, that the judgment of his Honor is reversed, and judgment here for the defendants.

Sinnott v. The State.

CHARLES N. SINNOTT v. THE STATE.

1. **CONTEMPT.** *Interference with selection of jury.* An attempt to induce an officer of the court to summon as jurors in a particular case then to be tried certain persons specified by him in preference to others, is an unlawful interference with the proceedings of the court, and is a contempt for which he is punishable by the court; and this is so, although not within the court-house or in the immediate presence of the court.
2. **SAME.** *Fines. Work-house.* Fines imposed for contempt may be required to be worked out in the county work-house, and defendant will not be allowed to discharge the fine by taking the insolvent debtor's oath.

FROM SHELBY.

Appeal in error from the Criminal Court of Shelby county. L. B. HERRIGAN, J.

GEORGE GANTT for Sinnott.

ATTORNEY-GENERAL LEA for the State.

COOKE, Sp. J., delivered the opinion of the court.

These were proceedings for contempt. The facts of the cases necessary to be stated are, that a cause of the State against one Mendinger, charged with embezzlement, had been set for trial upon a certain day in the criminal court of Memphis, and the sheriff furnished by the court with a list of the names of certain persons to be by him summoned as a special panel of jurors in said cause; that while the deputy sheriff, Powell, was engaged in summoning said persons, the plaintiff in error approached him with a list

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of names of persons which he endeavored to induce the deputy sheriff to summon as jurors upon said panel. After said panel had been exhausted, and the sheriff had been ordered to summon an additional panel of jurors without directions as to the persons to be summoned, while deputy sheriff Thomas Garvey was engaged in summoning said additional panel, the plaintiff in error approached him and endeavored to induce him to summon a certain person to the sheriff unknown upon the panel.

The plaintiff in error was attached for contempt of the court in each case. Neither of said acts for which he was attached were committed in the courthouse or in the actual presence of the court. The attorney-general filed specifications in each case. The plaintiff in error moved to quash the specifications filed, which motion was overruled by the court, and having filed his answer to said specifications, the court proceeded to hear the case, and having heard the testimony adjudged the defendant guilty as charged in the specifications, and proceeded, in the first case, to assess a fine of \$50 against the defendant, and ordered that he be imprisoned for ten days in the county jail, to which sentence the defendant submitted, and after the expiration of his term of imprisonment he came into court and moved the court that he be allowed to take the insolvent debtor's oath in liquidation of the fine of \$50 imposed on him as a part of said judgment for contempt. This motion was refused, and the court adjudged that the defendant be made to serve the same out, by con-

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finement in the county work-house, as other convicts are confined, and thereupon the defendant appealed to this court.

In the second case, the defendant's motion to quash the specifications having been overruled, he filed a plea of former conviction, which plea was heard and overruled by the court; and thereupon the court heard the evidence and adjudged the defendant guilty of the contempt as charged in said specifications, and assessed a fine of \$50 against the defendant, and adjudged that he be imprisoned ten days in the county jail, the term of his imprisonment to commence at the expiration of the former term of imprisonment pronounced in the other case against him, and in this case rendered a formal judgment against the defendant for said last mentioned fine of \$50, and all costs of the proceeding, and ordered execution to issue; and from which judgment, etc., the defendant appealed to this court.

Both causes have been brought here under one bill of exceptions. There was very clearly no error in the refusal of the court to quash the specifications in either case. By section 4106, sub-sec. 1, of the Code, it is provided: "The willful misbehavior of any person in the presence of the court, or so near thereto as to obstruct the administration of justice," is a contempt; and, by sub-sec. 4, abuse of or unlawful interference with the process or proceedings of the court, is also a contempt, and punishable by the court. The attempt of the defendant to induce the officers of the court to summon as jurors, in the

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particular case then to be tried, certain persons specified by him in preference to others, or, in common parlance, to "pack" a jury, was an unlawful interference with the proceedings of the court within the purview of said provisions, and was a contempt for which he was punishable by the court. Nor was it material that it was not within the court-house, or in the immediate presence of the court: *Harwell v. The State*, 10 Lea, 544.

The action of the court in refusing to allow the defendant to discharge himself from the fine imposed in the first of these cases, and rendering a "work-house" judgment against him, was correct. By the act of 1875, ch. 83, sec. 13, "Every person sentenced to be imprisoned in the county jail shall be compelled to work in the county work-house as other misdemeanor convicts, unless he give bond, with good security, to be approved by the jailer, and payable to the State of Tennessee, conditioned, etc. See also 5 Heis., 103; Code, sec. 4109. Fines for contempt of court are clearly within the spirit and meaning of the act of 1875, above cited.

There was no error in the action of the court in overruling the plea of former conviction. The offenses were wholly separate and distinct from each other, committed at different times, and by unlawful interference with different officers; and the fact that they were in relation to the trial of the same case can make no difference.

The judgment of the circuit court in each case will be affirmed.

Keep Manufacturing Company v. Moore.

KEEP MANUFACTURING COMPANY v. W. S. MOORE.

CARRIER. *Charges. Lien. Replevin.* An officer levied an execution upon goods which had been stopped *in transitu*. He paid the carrier the charges on the goods. Consignors brought an action of replevin. To defeat the action, the court was requested to charge that if the constable paid freight on the goods levied on, that plaintiff could not replevy the goods until he had paid said charges to the officer. This was refused by the court, and correctly. There was no demand for charges, nor the fact disclosed that there were any. He did not place his right to retain possession upon the ground of the carrier's lien.

FROM GIBSON.

Appeal in error from the Law Court at Humboldt.
J. T. CARTHEL, J.

W. M. McCALL and RANKIN & RHODES for Manufacturing Company.

WARE & MARTIN for Moore.

COOKE, Sp. J., delivered the opinion of the court.

This was an action of replevin instituted to recover possession of certain goods which had been shipped by the plaintiff from the city of New York to Bryant, Newhouse & McNeal, at Milan, Tennessee. The consignees became insolvent while the goods were in transit, and notice was given by the consignor to the carrier, in the exercise of his right of stoppage *in transitu*, not to deliver the goods.

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Upon the arrival of the goods at Milan, they not having come into the possession of the consignee, they were levied upon while in the railroad depot, by the defendant Moore, who was a constable, by virtue of an execution in his hands in favor of Speed & Co., against Bryant & Newhouse, and thereupon this suit was brought and the goods replevied out of his hands.

There was a verdict and judgment in favor of the plaintiff, and the defendant appealed to this court.

There was ample testimony to sustain the verdict, and the only question made here is upon the refusal of the court to charge certain specific requests of the defendant.

The charge of the court was full and correct upon the general principles of law applicable to the facts of the case, and no attempt has been made to criticise it.

The testimony, however, showed that when the defendant levied upon the goods, he was required by the carrier to pay \$1.45 freight upon them before taking them from the depot. And the defendant requested the court to charge the jury "that if Moore, the constable, did pay the freight charges when he levied upon the goods, that the plaintiff would have to pay back or repay the amount to Moore, being \$1.45, before he could replevy the goods." Which request was refused by the court.

There was also testimony showing that the goods had been ordered to be reshipped to the plaintiff, the consignor, and but for the seizure of them by the defendant, they would have been reshipped to the plaintiff at New York without payment of freight, which would

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have been collected upon the delivery of the goods to the original consignor in New York.

Whether this fact, as well as that the execution in the hands of the defendant, by virtue of which he levied upon the goods, was against a different firm from that to which the goods were consigned, the one being Bryant & Newhouse and the other Bryant, Newhouse & McNeal, would constitute the defendant a mere volunteer, or makes his act in obtaining the possession of the goods wrongful to the extent that he would not be entitled to be repaid the freight which he thus advanced it is not necessary to determine, for the reason that whether this was so or not, the defendant at the time the goods were replevied from him, made no demand to be reimbursed the amount of freight paid by him; nor did he disclose the fact, so far as appears from this record, that he had paid any freight; nor the amount thereof, or that he held any such demand against the goods without which the plaintiff could not be charged with knowledge of such demand or required to pay it. Even the carrier who parts with the possession of goods without enforcing his demand for freight, loses his lien: *Terril v. Rogers*, 3 Hayw., 203. And certainly a party who seeks to be substituted to the carrier's right can occupy no better position. It is very clearly deducible from this entire record that the right claimed by the defendant to the possession of the goods was by virtue of his levy, and not by reason of his having advanced this small amount of freight upon them.

We have been referred to a case decided by the

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Supreme Court of Kansas (19 Am. Law Reports, 84), in support of the position assumed by the defendant. The report of that case contained no bill of exceptions, and we cannot see what the facts of the case were. The findings of the court below were that the constable levying upon the goods had paid the freight on them, and that the party who replevied them had neither paid nor tendered the freight thus paid by him; and it was held that the constable was entitled to retain possession of the goods until this was done. There may have been a state of facts in that case which justified the decision, but certainly such a holding could not be sustained upon the facts of this case. And we would have to be better satisfied of the grounds upon which the decision was based than appears in the report of the case before we would be disposed to follow it.

If the defendant had made known the fact that he had paid the freight upon the goods and the amount so paid, and placed his right to retain the possession upon the grounds of his substitution to the carrier's lien for the freight so paid, and the plaintiff had refused to pay it, the case might be different. But certainly a defendant who had wrongfully levied upon the goods, and who, when they were demanded, concealed the fact that he had any charge upon them for freight advanced, and neither made known the fact of his having paid the same or the amount so paid, and placed his right to the possession upon the levy of his execution, and when this failed him to be then allowed to interpose a claim to a lien for the small

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amount of freights so advanced, and thus defeat the action would be trifling with justice. Under the facts of this case there was no error in the court's refusal to give the instruction as requested.

There were two other requests for specific charges which were also refused by the court, but as neither of them are now insisted upon, it is unnecessary to notice them any further than to say there was no error in the court's refusal to give them in charge to the jury.

The action was commenced before a justice of the peace, and there being no officer present and the case being urgent, the justice deputized one Weatherford to execute the warrant, who did so and signed his return J. P. Weatherford, deputy constable, and it is now insisted that the case ought to be reversed because the justice did not insert the christian name of the person deputized in the order.

There was no effort any where to show that the person who executed the warrant was not the same person deputized for that purpose; nor was there any objection taken in any manner to this proceeding either before the justice or in the circuit court, but the objection is for the first time taken here. There is nothing in it.

Let the judgment of the circuit court be affirmed.

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11L 390
2pi 519
2pi 589

RICHARDSON & NELSON v. J. H. BLAKEMORE.

LANDLORD AND TENANT. *Purchaser of tenant. Lien.* A suit by landlord may be maintained against a purchaser of the crop, or any part thereof, from the tenant before any recovery of judgment against the tenant or before the rent is due.

FROM GIBSON.

Appeal in error from the Circuit Court of Gibson county. J. T. CARTHEL, J.

T. E. HARWOOD for Richardson & Nelson.

CALDWELL & CALDWELL for Blakemore.

DEADERICK, C. J., delivered the opinion of the court.

In 1880, Blakemore, who had rented land, sub-let it to one Frank Grimes, who agreed to pay two bales of cotton rent.

Blakemore's statement of the contract is that the rent was to be paid in the first two bales picked, and was then due, while Frank Grimes testified that there was no agreement when the rent was payable, and he rented for a year early in 1880.

The suit was brought against defendants, purchasers from Grimes, of the first bales of cotton picked, before a justice of the peace, November 11, 1880, and a plea in abatement filed, on the ground that the rent was due from Grimes at the time the suit was brought.

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The justice rendered judgment for plaintiff and defendants appealed to the circuit court. There a verdict and judgment were rendered for the value of the cotton sold to defendants, and they have appealed in error to this court.

The errors assigned here are that the verdict is not supported by the evidence; because of error in the charge of the court in instructing the jury that the suit might be maintained even if the claim for rent was not due at the time it was instituted; because of refusal to charge as requested; because the court decided the question raised by the plea in abatement, after it was submitted to the jury; and lastly, because the court charged that the suit might be maintained against defendants, without first obtaining a judgment against Grimes, the renter.

As to the first ground of objection, we think there is sufficient evidence to show that Grimes rented the ground of plaintiff below, and that the cotton was sold to defendants by him, and that plaintiff had a lien upon it for his rent. .

The request of defendants was that the jury be instructed that it was necessary, if a time and place for delivery of cotton was not agreed upon, that the plaintiff prove that he made demand, etc.

In a suit against defendants it was immaterial whether a demand was made. If the suit was maintainable at all against them, it was upon the ground that defendants had purchased cotton of the producer, upon which the statute gave the landlord a lien and right of action against the purchaser.

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The further objections that the court charged the jury that it was not necessary that the rent should be due before suit is brought against defendants as purchasers, nor that a judgment should be had against Grimes, may be considered together.

By the act of 1825, Code, secs. 3539 and 3541, a debt for rent of land is a lien on the crop in preference to all other debts, and the lien may be enforced by attachment or judgment against the tenant, and execution levied on the crop in whosoever hands it may be. By the act of 1857-8, Code, sec. 3540, this lien continues for three months after the debt becomes due. Under the act of 1825, it was held that the landlord could not sue the purchaser of the crop until he had obtained judgment against the tenant: 6 Yer., 267; 7 Yer., 494. By the act of 1857-8, Code, sec. 3542, it is provided that the person entitled to the rent may recover from the purchaser of the crop, or any part of it, with notice of the lien, the value of the property so that it does not exceed the amount of the rent and damages.

This last named section of the Code is amended by chapter 72 of the acts of 1879, so as to make the purchaser liable, although he may not have had notice of the lien.

It is earnestly and ably argued for defendants below, that there is nothing in section 3542 to warrant the construction adopted by the court, that the suit against the purchaser of the crop may be maintained without first having obtained a judgment against the tenant, and that such suit may be brought before the rent is due, or to

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change the construction given in the cases cited, that it is necessary before suing the purchaser, to have judgment against the tenant. It will be observed that the act of 1825 did not in terms give the landlord any action against the purchaser, but only pointed out the mode of reaching this property of the tenant and enforcing the lien declared in favor of the landlord.

Section 3542 of the Code does give a right of action to a person entitled to the rent, directly against the purchaser, not for the property itself, but for its value. So far as the act specifies, if a person is entitled to the rent, he may recover from the purchaser the value of the property upon which he has a lien. It would seem that his cause of action is, that property, on which he has a lien, has been purchased of the debtor, and the right of the creditor thus interfered with, and he is given an action to recover its value because the property has been purchased by another, and if the action may be maintained because of the purchase, it would seem that the right to sue would accrue when the purchase was complete and the property delivered.

To support the action under section 3542 of the Code, the plaintiff must show that he is entitled to the rents, and that defendant is the purchaser of the crop, or part of it, and the value of the property so purchased. and then he may recover the value of the property, not to exceed the amount of rent and damages.

But it is plausibly argued that inasmuch as the recovery is to go in extinguishment of the renter's liability, there ought to be no judgment against the

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purchaser until it is judicially ascertained in a suit between the landlord and tenant, what sum, if any, is due; and that this cannot be done until the liability of the tenant is in fact due and payable. And that no adjudication can be had against the tenant, except in a suit directly against him.

To this it may be answered that the suit is not against the tenant upon his indebtedness to the landlord, and would not preclude him from making defense in a suit against him, or instituting proceedings to assert his rights. It is a suit which the statute authorizes against a party who has purchased property that is liable to the plaintiff's demand, and this the plaintiff must prove, to entitle him to recover. The recovery is from the purchaser, for property, the title to which the tenant has estopped himself from setting up claim, but he is not estopped from bringing suit against plaintiff, or defending suits brought by him, or the purchaser.

The plaintiff must prove his claim for rent, just as he would be required to do, if he had brought suit against the tenant. The latter is a competent witness in such case, and was examined on the trial of this case.

We are of opinion, therefore, that there was no error in the charge of the court. The court disposed of the plea in abatement as if on demurrer or motion to dismiss, although in fact no issue was taken on it.

The judgment will be affirmed.

Cheatham, Pearce & Co. v. Thornton.

CHEATHAM, PEARCE & Co. v. M. L. THORNTON.

MARRIED WOMAN. *Sale of personalty.* A married woman without estate buys a stock of goods from a trustee under an assignment by her husband. Creditors of husband levy upon the goods. *Held:* She had the right to purchase, and there being no fraud, the sale was valid.

FROM MADISON.

Appeal in error from the Law Court of Madison county. H. W. McCORRY, J.

BULLOCK & HAYS for Cheatham, Pearce & Co.

McCORRY & BOND and CAMPBELL & JACKSON for Thornton.

TURNEY, J., delivered the opinion of the court.

In May, 1880, W. H. Thornton, husband of the plaintiff in error being indebted, made an assignment of all his goods to J. W. Vanden for the benefit of creditors, including plaintiff in error. Vanden, after selling off a part of the goods, sold such of the stock as remained to Mrs. M. L. Thornton, the wife, upon credit. The bill of sale conveys to her sole and separate use, free from the debts of her husband, and retains a lien to secure the purchase money.

Mrs. Thornton took charge and carried on business in her own name, her husband acting as one of her clerks until September, 1880, when plaintiff in error had execution issued and levied upon the goods. About

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\$110 worth of goods were sold by Mrs. Thornton before levy, \$28 had been paid to Vanden. Mrs. Thornton, by her next friend, the husband, replevied.

The circuit judge trying the case without a jury, gave judgment for the plaintiff below.

The case was heard at the last term of this court and judgment reversed, and is now before us on petition to rehear.

Mrs. Thornton had no estate at all, and the question is, was the purchase by her valid, or did it enure to the benefit of the husband and subject the goods to the claims of his creditors?

When Vanden became trustee and the creditors accepted under the trust deed *eo instanti*, a liability to the extent of the reasonable value of the goods was fixed upon him. If he improperly converted the goods or disposed of them, he made himself liable to creditors of Thornton for their value. There is nothing in this record that intimates his insolvency, the deed relieves him from giving bond and the creditors have accepted.

In *Meagher v. Hollenberg*, 9 Lea, 387, it is said: "The contract of a married woman, so far as it is executory, is void by reason of her incapacity to make it. She may take title or an interest in property by a sale to her, and the vendor who retains a lien to secure the purchase money, may enforce it against the property."

. It is a rule in this State that, although the executory contract of a married woman is void, it can only be so held upon her plea of coverture. Here she is insisting upon her contract.

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There is no pretense of fraud on the part of Mrs. Thornton and the trustee. So far as appears, the sale and purchase were made in good faith, she has executed in part, and by her action indicates a purpose to execute in full. Her vendor looks to her alone, his only security being a lien on the goods. The trustee was authorized to sell. His sale was a conversion, and by it he became responsible to the extent of its amount.

We therefore think the holding at the last term was erroneous. The judgment of the circuit court is affirmed.

SEIDENBACH, SWAB & CO. *et al.* v. M. DENKLESPEIL *et al.*

CHANCERY PLEADINGS AND PRACTICE. *Surety on receiver's bond.* A surety upon the bond of a receiver appointed by the chancery court gets into his hands a part of the trust fund. *Held:* That the court had sufficient jurisdiction of him by reason of his suretyship on said receiver's bond to make an order to act *in personam*.

FROM CROCKETT.

Appeal from the Chancery Court at Alamo. JOHN SOMERS, Ch.

E. J. & J. C. READ and D. P. READ for complainants.

Seidenbach, Swab & Co. v. Denklespeil.

E. J. READ, J., and R. S. THOMPSON for defendant.

COOKE, Sp. J., delivered the opinion of the court.

During the progress of this cause in the chancery court, one W. A. Tucker was appointed receiver in the cause, for the purpose of selling certain goods, etc., attached in said court, and executed a bond as such, conditoned to discharge the duties of such receiver and abide by and perform the orders and decrees of the court, etc, with one R. G. Harris, E. Ellengton and H. H. Maken his sureties on said bond.

Said receiver sold said goods for \$1,050 and turned over the proceeds of the sale, or a portion of them, to said Ellengton to indemnify him as his surety on said bond, and of which Ellengton collected \$500 as was made to appear to the chancellor. He thereupon made an order upon said Ellengton that he forthwith pay into court said sum of \$500 so received by him of said effects.

Upon said order being made, said Ellengton filed a petition setting forth that he was not present at the taking of the testimony upon which said order was based, had no opportunity to cross-examine the witnesses, and setting forth a feeble denial that he had so received said money.

Thereupon the chancellor made an order suspending the former order upon said Ellengton to pay said money into court, and allowed proof to be taken on all sides as well by said Ellengton as any of the other parties, in regard to the matter.

Proof was taken and the matter again coming on

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to be heard, and the chancellor being satisfied that said Ellengton did receive of the proceeds of the sale of the goods attached and sold by the receiver, the sum of \$500, knowing the same to be a part of said fund, dismissed said petition, and reaffirmed said former order, and ordered said Ellengton peremptorily to pay said sum of \$500, with interest from the time he received the same, into the office of the clerk and master within ninety days from the date of said last order. To which Ellengton excepted and appealed to this court. And this is the only question now involved in this cause.

There was no error in the action of the chancellor in this matter. The testimony fully shows that said Ellengton, by reason of his suretyship on said receiver's bond, did get into his hands this sum of \$500, knowing it to be a part of said trust fund, and the court had sufficient jurisdiction of him by reason of his suretyship on said receiver's bond, and by reason of his intermeddling with the fund impounded in said court to make upon him the order to act *in personam* for the preservation of said fund.

There was no error in the order of the chancellor and it will be affirmed with costs.

State v. Woodruff.

THE STATE OF TENNESSEE for the use, etc., v. A.
WOODRUFF, *et al.*

TAXES. *Act of 1882 construed.* An act of the Legislature of April 26, 1882, entitled, An act to provide for the more efficient collection of back taxes, is a special remedy, and must be strictly pursued. A purchaser at a sale made under said act will be relieved of his purchase unless the requirements of the act are followed.

FROM SHELBY.

Appeal from the Chancery Court at Memphis. W.
W. McDOWELL, Ch.

M. MERIWETHER and C. W. HEISKEL for complain-
ant.

J. J. DUBOSE for defendant.

COOKE, Sp. J., delivered the opinion of the court.

By an act of the Legislature passed April 26, 1882, entitled an act to provide for the more efficient collection of back taxes, it was provided in the first section that all back-tax collectors appointed by the comptroller, or judge or chairman of the county court, and agents or persons appointed by the State, or any officer of the State, to collect back taxes, are hereby required, out of the rents collected by them from any property bought in by the State, in their possession, or under their control, first, to pay all current taxes on the same—State, county, municipal and

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taxing district; and whatever balance may remain shall be applied, first, toward the payment of back taxes due the State and county, in preference to municipal taxes; and secondly, to municipal or taxing district taxes. By section 4 of said act it is further provided, that if at any time it appears to any such back-tax collector or agent that any property bought in by the State under his control, will not, in two years, from the rents thereof pay current and back taxes, it shall be his duty to cause a bill to be filed, as hereinafter provided, for the purpose of having said property sold for taxes, etc. * * Such bill shall be filed in the name of the State, in all cases where back taxes are due it, for its own use, and the use of the county, city, town or taxing district in which said property shall be situate.

It is further provided that only one bill shall be filed against any one piece of property, or different pieces of property, belonging to the same owner or owners; and to this end it shall be the duty of the officer or agent whose duty it is to cause said bill to be filed, to notify all other back tax collectors or agents of his intention to do so, giving a description of the property in the notice. After such notice no other bill shall be filed, but all other claims for back taxes on said property shall be filed by petition in the same cause within thirty days from the filing of the bill. And in order to give time for the filing such petitions, no process shall issue or publication be made on such bill until the expiration of thirty days from the filing thereof, so

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that process or publication may require an answer to all the petitions as well as to the bill.

Uner the provisions of this act the bill in this case was filed, and two lots in the city of Memphis decreed to be sold for taxes as the property of respondent, Woodruff, and accordingly were sold by the master and bid off by the petitioner, W. I. Chase, who, before the confirmation of said sale, filed his petition in said cause, by which he states that his bid (\$225) was the full value of said lots; that he is entirely willing to have said sale confirmed, and pay the amount bid by him for said lots in the event he can obtain a good and valid title to the same; but he alleges that he will not obtain a good title under said decree and sale, and should not be required to comply with its terms for the following reasons: 1st, Because process was issued in said cause immediately after the petitions of Shelby county and the Taxing District were filed, and before the expiration of thirty days after said bill was filed. Second, Because it is not averred by said bill, or in any manner shown, that the rents of said lots for two years are not sufficient to pay off all taxes due upon them, which, it is insisted, is necessary to be shown in order to give the court jurisdiction to sell said lots under this proceeding. 3d. That there was no sufficient evidence of the existence of the taxes against said lot for which it was decreed to be sold. 4th. That there is a large amount of old city taxes due upon said lots, which, as he is informed, are a lien on the same; that said bill was filed for State and

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county taxes alone, and the representative of the old city of Memphis was not made a party; that the amount bid by him is the full value of the lots, but was not enough to satisfy the State and county taxes due thereon, and that said property will be sold over again to satisfy the back taxes due the old city of Memphis; and if he complies with the terms of said bid he will either lose the property or be compelled to purchase it over again, after having paid full value for it. And he states that he has learned all these facts since said sale.

The foregoing facts, as well as all the other allegations of the petition, are admitted by a special agreement of the parties to be true.

Minor Meriwether, receiver and back-tax collector of the extinct municipality of the city of Memphis, came in by intervention, he not being a party to the proceedings before the sale, and asserts his right to have the property re-sold to satisfy a large amount of back taxes due upon it to the city of Memphis. The chancellor was of opinion that the facts set forth were not sufficient to relieve the petitioner from complying with the terms of the sale, or to release him from said purchase, and overruled the petition and confirmed the sale, and the petitioner has appealed.

We think the chancellor erred in his conclusion. The agreement admits that the bill was filed under the authority of the act above cited, which was a special remedy and must be strictly pursued. The very object of the notice to the collectors of other back taxes before filing the bill of the purpose to do

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so, and of the stay of the issuance of process for thirty days after the bill was filed, was to give all parties having a claim or lien for taxes against the property an opportunity to come in and make themselves co-complainants by petition, so that process could issue against the owner of the property, requiring answer to the petitions of all claimants as well as to the original bill; and by the failure to give the notice to the back-tax collector of the old or defunct municipality of Memphis, and to stay the issuance of process for thirty days, may, and we are authorized to presume did, prevent him from coming in and asserting his lien for back taxes in the order in which he was entitled to them by the statute. At least the opportunity of doing so which the statute required was not given him. The admission further shows that this lien did exist, and the party entitled to it was not before the court or a party to the proceeding.

The agreement further shows that these lots were only decreed to be sold for the State and county taxes. Hence, the lien of the old city of Memphis for back taxes upon said lots was not extinguished: *Nashville v. Cowan*, 10 Lea, 209. And said old municipality, or the collector of its back taxes, had a right to be before the court, not only to enforce its lien, but to contest the others that were claimed as superior to it under the statute. For this reason it is manifest that the petitioner cannot obtain a good title by his purchase. He had a right to presume the requirements of the law had been complied

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with in bringing the lots to sale, and when he ascertained that they had not, he was entitled to be relieved of his purchase.

In this view it is unnecessary to examine the other questions raised by the petition.

The decree of the chancellor confirming said sale will be reversed, the sale set aside, and petitioner relieved of his purchase of said lots.

JESSE A. FORREST v. L. D. GRANT.

PLEADINGS AND PRACTICE. *Suit to recover money lost at gaming.* A husband may bring a suit for the use of his wife to recover money lost at gaming, after the expiration of ninety days and before the expiration of twelve months.

FROM SHELBY.

Appeal in error from the Criminal Court of Shelby county. L. B. HARRIGAN, J.

R. D. JORDAN for Forrest.

W. B. GLISSON for Grant.

FREEMAN, J., delivered the opinion of the court.

Forrest won a hundred dollars from Grant on a horse race. After the expiration of the ninety days provided by Code, sec. 1771, for the suit to be brought by the person losing, Grant sued Forrest for

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the money. On the trial before the magistrate he moved the justice to allow him to amend by making the writ read, "for the use of his wife, Belle F. Grant," which was allowed, and no exception taken to this action. Judgment was rendered for plaintiff, and an appeal taken to the circuit court, where the case was tried by a jury, under charge of the court, who rendered a verdict for plaintiff, from which there is an appeal in error to this court.

The only error assigned is, that the court refused to charge, as requested, that the husband could not bring a suit for the use of the wife, after the expiration of ninety days and before the expiration of twelve months.

Section 1772 provides: "Any person may, after the ninety days and within twelve months thereafter, recover the amount of such money, thing, or its value, by action for the use of the wife, and if no wife, the child or children, and if no child or children, the next of kin of the loser."

While, if objection had been taken, it might well have been doubted whether this was an amendment in any proper sense, but the bringing of a new suit in an independent right, different from that in which the suit was commenced; yet no objection being taken, treating it as an equivalent to a new suit—as has been done below—we see no reason why the husband may not as well bring this suit, under the language of the section quoted—"any person"—as a third party.

The court so held, and we affirm his judgment.

Maxwell v. Reilly.

P. MAXWELL v. REILLY, Adm'r of Lee R. Kerr,
dec'd.

STATUTE OF LIMITATIONS. *New promise.* The holder of a promissory note died, his widow presented the note to the maker before appointment of administrator, who promised that he would pay. Such a promise is not such an acknowledgment of the debt as to take it out of the operation of the statute of limitations. A promise made to a person not entitled to the paper, whether the promisor knew it or not, could in no event inure to the benefit of the party entitled, to whom no promise is made or intended to be made. A promise, to take the case out of the statute, must be made to the holder, or, if to another, such privity must be shown between the party addressed and the creditor, that what was said to the former might fairly be presumed to have been meant to reach his ear and influence his conduct.

FROM SHELBY.

Appeal in error from the Circuit Court of Shelby county. J. O. PIERCE, J.

WEATHEREORD & ESTES for Maxwell.

J. A. TAYLOR and R. H. THARPE for Reilly.

FREEMAN, J., delivered the opinion of the court.

This suit is brought by the administrator of Kerr on a note signed by defendant, due December 31, 1870, the suit brought May 28, 1880. Reilly was appointed administrator May, 1880.

The defense is statute of limitations, and the reply is a new promise. The only proof tending to show such promise is the testimony of the widow

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of Kerr, who says she called on defendant in December, 1878, and told him (Lee) her husband had given her the note, that her health was bad, and she would be glad if he would pay her something on it; that he said he could do nothing for her then. She called again in a short time, when, she says, she showed the note, and he said he owed it, and promised to pay it; asked her not to trouble him about it, as he could not pay it then, but paid her ten dollars on it.

This is all denied by defendant. The jury, however, have found the promise was made. The question is, whether this finding can be sustained, and did his Honor charge the law correctly.

His Honor charged that the promise, if made to her, might be such a new promise, or acknowledgment of the debt, as to revive it, for the promisor could not know but that she was owner and holder of the note under a will of the husband, or as part of her year's support given her by the commissioners, or that she was administratrix, and therefore properly entitled to collect it. He then says, if none of these things exist, and the jury find that the defendant made the promise to her, intending to have her communicate it to the legal representative when there should be one, then this would be sufficient to revive the debt and bind the defendant.

As to the first part of this charge, we need but say that it is not correct, as applicable to the case, because a promise made to a person not entitled to the paper—whether the promisor knew it or not—

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made under the circumstances stated, could in no event inure to the benefit of the party entitled, to whom no promise is made or intended to be made. The debt could not be revived, as he has stated, on the facts on which the revivor is based by his Honor.

The correctness of the second proposition is sought to be maintained on the authority of the case of *Bachman v. Roller*, 9 Baxt., 414, the principle of which is, simply, that a new promise being a new contract based on the old consideration, that it must be either made to the party himself, or to some one for him. It is said *arguendo*, that the promise may be made to the stranger with the intent that it should be communicated to the creditor, which means, however, the same thing.

The principle decided in the above case is cited from 1st Smith's L. Cases, 889, that for such a promise to take the case out of the statute, the existence of such privity must be shown between the person addressed and the creditor, that what was said to the former might fairly be presumed to have been *meant* to reach his ear and influence his conduct.

Nor is it certain that the facts here shown indicate such purpose; on the contrary, it is definitely rebutted. The claim was made by the widow that she owned the note by gift from her husband, and she urged its payment on the ground of personal need pressing on her at the time. Now, to say that such a promise was intended, or could be presumed to have been intended, to reach the ears and influ-

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ence the conduct of an administrator appointed nearly two years afterwards, is simply absurd. The jury were evidently misled by his Honor's charge, and the facts stated by the witness do not furnish the slightest ground on which a new promise to the administrator, who is plaintiff, can be sustained. The verdict was either the result of being misled by the charge, or of passion or prejudice on the part of the jury, with no evidence on which to sustain it, and in either event cannot be sustained. It must be reversed.

ROBERT WILSON v. THE STATE.

CRIMINAL LAW. *Arrest by private citizen.* A private citizen has the right to arrest when a felony has been committed and he has reasonable cause to believe the person arrested committed it. Reasonable grounds will justify the arrest, whether the facts, when developed, would be sufficient or not. The finding of stolen goods in possession of the party arrested was proof sufficient that a felony had been committed, especially when connected with the confession of larceny by the prisoner, and finding some of the property where defendant said he had secreted it.

FROM SHELBY.

Appeal in error from the Criminal Court of Shelby county. L. B. HARRIGAN, J.

T. E. RICHARDSON and J. M. HARRIS for Wilson.

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ATTORNEY-GENERAL LEA for the State.

TURNEY, J., delivered the opinion of the court.

Plaintiff in error was indicted and convicted of murder in the first degree for the killing of Frank B. Russell. The facts are, substantially, as follows: On the night of the killing Russell was heard to cry, Halt! halt! halt! and immediately after the last cry the report of a pistol was heard. On going to the place witness found the prisoner lying on the sidewalk, and Russell standing over him with a pistol in his hand, the prisoner praying for mercy and begging Russell not to shoot him any more. Prisoner was shot in the rear portion of the leg, just below the hip joint. He had in his hand a bucket of lard. Russell said, "D—n you! I've got you, have I? Get up from there, I want to see if I know you."

The prisoner was assisted in getting up, and led into a drug-store. The bucket of lard was also taken in. The prisoner was seated on a stool. Russell said: "That is my bucket of lard; I bought it a day or two ago." Defendant made no reply. Russell, still with pistol in hand, said to prisoner: "Hold your head up, sir; I want to see you; I want to know who you are."

"The prisoner seemed to be in agony, was groaning and going on at a terrible rate."

Russell asked a clerk in the drug-store to telephone for the police. While the clerk was doing so, the prisoner sprang toward the door. Russell

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and another "grabbed" him. They struggled toward the door. The prisoner caught the hand of Russell that held the pistol with his (prisoner's) right hand, and as they passed out of the door bit the wrist of the witness, who was assisting Russell, and broke his hold, and witness retired from the scuffle. Russell and the prisoner continued the struggle, both holding to Russell's pistol. The prisoner placed his right hand behind him, drew his pistol, and, stooping, pointed it toward Russell and fired three shots in quick succession. Russell died of the wounds. The prisoner was arrested that night. He had both his and Russell's pistols. He sent for the chief of police, and told him that he and a man named Williams went to Russell's store the night before the shooting; that Williams broke and entered Russell's store; that he (defendant) remained on the outside and watched; that Williams brought out some goods; that they could not carry all away, and left a bucket of lard in a vacant lot, and he went after it the night of the killing; that some of the goods were at Stonewall's, and some were under an old house. The goods were found at the places named.

By Code, secs. 5042 and 5043, it is enacted that a private person may arrest another, 1. For a public offense committed in his presence; 2. When the person arrested has committed a felony, although not in his presence; 3. When a felony has been committed and he has reasonable cause to believe that the person arrested committed it. He shall at the time of the

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arrest inform the person arrested of the cause thereof, except when he is in the actual commission of the offense, or when arrested on pursuit."

The arrest in the present case was on pursuit, and the facts already cited show that the person was fully advised of the cause for which he was arrested, and by his silence confessed to the larceny of the bucket of lard. There is ample proof in the record to convict him, at least, of the larceny.

The statute does not make it necessary to show that a greater offense had been committed. It is sufficient if a felony has been committed, and the party arresting had reasonable grounds to believe the arrested party had committed it. Here he was found and seized with stolen goods in his possession, and with which he was trying to escape.

The court charged the jury: "If you find that a felony had been committed, that is to say, if you find from the evidence that the business house of the deceased had been broken and entered for the purpose of stealing the personal property therein, on the night before the difficulty between deceased and defendant, and the deceased had reasonable grounds to believe that the defendant was the party, or one of the parties, who committed said crime, then the deceased had a lawful right to arrest the defendant, and after the defendant was notified by the deceased of the cause of such arrest, it was the duty of the defendant to submit to such arrest until he might be within a reasonable time turned over to the officers of the law. And if the defendant attempted to

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break said arrest, the deceased would have a right to use all the force absolutely necessary to detain the defendant in such arrest, and if the defendant, with the intent to escape from and avoid such arrest, willfully, deliberately, premeditatedly, and with express malice, shot and killed the deceased, then the defendant would be guilty of murder in the first degree."

There is no error in this charge of which the prisoner may complain. It is too favorable to the prisoner. It was even against the State to confine the charge to the felony defined in the charge.

Russell had reasonable grounds to believe the prisoner guilty of stealing the lard. And having such reasonable grounds of belief, it was the duty of the prisoner to submit to the arrest as required by the statute. Reasonable grounds justified the arrest, whether the facts when developed would be sufficient to convict or not. We must be controlled by the statute. Common law rules in conflict with it are modified by it. The facts, however, demonstrated the prisoner's guilt. If the charge had stopped short of the house-breaking with intent to steal, it would have been sufficient, and there is nothing in that part of it calculated to mislead the jury to the prejudice of the prisoner. The conduct of the prisoner after he was arrested, his feigned suffering to throw parties having him in custody off their guard, show conclusively that he fully understood the situation. He had, we have no doubt, armed himself to kill, if it became necessary to complete the felony he had

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undertaken, or to protect himself from arrest. His plans were well formed.

We see no reason to disturb the verdict, and the judgment is affirmed.

FREEMAN, J., dissents.

The judgment of the court is, that the prisoner be remanded to the jail of this county; that he be delivered by the sheriff of this county to the sheriff of Shelby county, who will, on Friday, the 20th day of July, 1883, between the hours of 10 o'clock A. M., and 4 o'clock P. M., within the jail of said last named county, or within the enclosed yard of said jail, or within an enclosure erected for the purpose adjacent to the prison, as provided by law, on a gallows, privately hang the prisoner by the neck until he is dead.

The enclosure to be higher than the gallows, or so constructed as to exclude the view of persons outside thereof: Acts 1883, p. 139.

Reagan v. Stanley.

W. R. REAGAN *et al.* v. L. E. STANLEY *et al.*

1. WILLS. *What constitutes.* All that is required to constitute "a paper writing appearing to be the will of a deceased person," within the meaning of the Code, sec. 2163, is that the writing should purport to be a disposition of the writer's property after death.
2. SAME. *Valuable papers.* Valuable papers, within the meaning of the same section, are not papers having a money value, but only such as "are kept and considered worthy of being taken care of by the particular person."
3. SAME. *Holographic.* Entries in a continuous diary purporting to make a disposition of the writer's property after death, written and signed by him, the handwriting being proved as required by statute, may be probated as a holographic will.
4. SAME. *Handwriting.* An entry in a continuous diary, written by the party himself, purporting to make a disposition of his property after death, may be set up as a will of personalty, although not signed nor attested, if the handwriting be sufficiently proved.
5. SAME. *Revocation.* All wills are of equal grade or solemnity to the extent of their valid provisions after probate, and, therefore, a later informal will, neither signed nor witnessed, set up as to personalty, will to that extent revoke a prior holographic will.

FROM FAYETTE.

Appeal from the Circuit Court of Fayette county.

T. J. FLIPPIN, J.

H. C. MOORMAN and GEO. HARDIN for Reagan.

STAINBACK & RIDDICK and H. P. HOBSON for Stanley.

COOPER, J., delivered the opinion of the court.

The issue of *devisavit vel non* in this case was tried

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by the circuit judge without a jury, and found in favor of the proposed will. The defendants appealed in error.

L. E. Stanley, the alleged testator, died on the morning of the 29th of November, 1879, at his residence in the town of La Grange, Tennessee, leaving the propounders and contestants of the will in controversy, who were related to him in the degree of second cousins, and citizens of Texas, as his only heirs and next of kin. He was, at the time of his death, about sixty-five years of age, a bachelor, living alone and keeping house with one servant, an old negro woman named Lucy Freeman. He was a justice of the peace, the treasurer of the town corporation, and also treasurer of one or more lodges of secret societies. His estate consisted of about \$4,000 in personalty, and of realty of nearly equal value. The writings propounded as the will of the deceased were embodied in, and formed parts of a diary or journal kept by him in a large blank book. The entries in the diary are generally dated, commencing May 1, 1878, and ending November 27, 1879, the day before the morning of his death. The diary is closely written, the entries following each other without blank spaces. The proposed will consists of certain of the entries of the diary under date as follows: September 30, 1878, October 3, 1878, February 28, 1879, April 10, 1879, and April 16, 1879. The first, second and fourth of these entries are signed by the deceased, and are the only entries in the diary that are signed. These entries were found by the trial judge to constitute a holographic

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will, sufficient to pass real and personal property. The third of the specified entries, dated February 28, 1879, which is unsigned, the trial judge found to be a good will to pass personalty. The last entry mentioned was held not to be testamentary.

The entry of September 30, 1878, sets out with a statement that the writer had invited Mary F. Butler, one of the contestants, to visit him, he being then in feeble health from a disease of the heart which eventually caused his death; that she had come, with her son, J. A. Butler, and was then at his house, and that the visit, for reasons stated, was not pleasant to him. The entry concludes thus: "Should I die while they are here, I want Dr. J. J. Pulliam to take charge of what little I have, and give them (Mrs. Butler and son) enough to take them to their home (Bryan, Texas), and not a cent more, for they have got enough for their share. I have a little over four thousand in money, and owe Dr. Pulliam a medical bill, which is every cent I owe. I have a number of relations in Texas. If they are no better than these, I don't want them to have a cent neither. I have a namesake, L. E. Stanley, living now in Weatherford, Parker county, Texas. If he is all right, he could have it all; if not, none. Old aunt Lucy Freeman, colored, I want her to have one hundred and fifty dollars. She is honest, and has protected my interest more than any one else has ever done, and can live in the room she now occupies as long as she lives, if she wants to do so, and no one is to molest her in her right. And she has a cow and

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calf which I gave her a few years ago, when the cow was a little calf, because she saved its life. I have not finished my wishes yet, but I am interrupted and must stop. But it is as good as I can say now. And I want what I have said above carried out by all means, if I have any friends to do it." He then signs his name. ,

In the entry of October 3, 1878, he mentions his intention of leaving home that evening on account of yellow fever, and adds: "I am here now alone except Aunt Lucy Freeman, and if she lives and I die I want her to communicate with Dr. J. J. Pulliam, and tell him what I have told her. I say this in case I die and she lives to tell him when he comes home. I will leave the book with Aunt Lucy. I sign my name to this as my wish. My lots Dr. P. can do as he thinks best. I want my grave lot put in good condition. I have a plenty to do it with All my kindred is distant, and they care nothing for me." Entry signed.

The entry of February 28, 1879, not signed, is in these words: "Received a letter from Mrs. L. A. Babb, the first I ever received from her. She is my second cousin. They all hear that my health is bad, and it makes them write. But if I have anything to leave to any of my relations in Texas, I had rather Lucy Ann Babb, who resides now at Wortham, Freestone county, Texas, and L. E. Stanley, my namesake, who lives at or near Weatherford, Parker county, to have what I have than any of the rest. I do not want Mary F. Butler, and her son

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J. A. Butler, to ever have one cent of my estate, should I leave anything. They got their share beforehand in a way I did not like."

The entry of April 10, 1879, is: "Received a letter from Mrs. Lucy Ann Babb. Charley Harris has received one from Jas. A. Butler. Don't write to me, but to him to find out how I am making it. If I had 100,000 dollars, Jas. A. Butler, nor his mother not should have one cent of it if I could help it. They were to see me last Summer, and I soon found out that all they wanted was what little I had. They cost me between two and three hundred dollars. They are very little kin to me anyway, only second cousins. Can't or must not have one cent of my estate when I die, and I want my friends to see (to) it, if I have any friends here." This entry is signed.

The last entry, under date of April 10, 1879, which was held not to be testamentary, speaks despondingly of the writer's health, repeated that he owes no one anything except Dr. Pulliam, expresses a desire to settle this one debt, and adds: "Don't want to give my admistrator any trouble when I am dead, only to hand over what little effects I have to the parties designated."

The judgment of the trial court is that the cause came on to be heard, and the court finds "the following paper writing, is the last will and testament of L. E. Stanley, deceased, in words and figures following, to wit, it being the first four entries in the diary of the said L. E. Stanley which the proponents offered to set up as his will," setting out the entries

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in *haec verba*. "And the court finds the entries of date September 30, 1878, October 3, 1878, and April 10, 1879, as set out above, is the holographic last will and testament of L. E. Stanley, deceased, as to both the realty and the personalty mentioned therein, all of said entries being signed by him. But it finds that the entry of date of February 28, 1879, set out above is the last will and testament of L. E. Stanley for his personalty only, it not having been signed by him. But the court does not undertake to determine whether any of the parties in interest take anything under said clause, but only that it is testamentary in its character. And the court further finds the fifth and last entry in the diary of said L. E. Stanley, deceased, which proponents endeavor to establish as a part of the will of said L. E. Stanley, deceased, and which is in the words and figures following, to wit, (setting it out), is no part of said late will and testament. And the court doth further find that all of the above given entries, and every part thereof, are in the handwriting of the said L. E. Stanley, deceased; that said handwriting was generally known by his acquaintances, that it was proven by four credible witnesses, and that the book wherein said entries were made was found among the valuable papers of said L. E. Stanley, deceased, after his death, and that the first four entries set out above are the last will and testament of said L. E. Stanley, deceased. It is therefore considered by the court," etc.

The judgment is not a special finding of all the facts, but only of those facts essential to the validity

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under the statute of a holographic will, and of a will of personalty. It does not undertake to state any of the principles of law which should govern in the finding of the facts. Under these circumstances, the findings of fact are conclusive if there is any evidence to sustain them.

By the Code, sec. 2163, a paper writing appearing to be the will of a deceased person, written by him, having his name subscribed to it, or inserted in some part of it, and found, after his death, among his valuable papers, or lodged in the hands of another for safe keeping, shall be good and sufficient to give and convey lands, if the handwriting is generally known by his acquaintances, and it is proved by at least three credible witnesses that they verily believe the writing and every part of it to be in his hand.

"A last will," says Swineburn, "is a lawful disposing of that which any one would have done after death." It is a voluntary disposition of property, in a mode recognized by law to take effect after death. All that is required to constitute "a paper writing appearing to be the will of a deceased person," within the meaning of the statute, is that the writing should purport to be a disposition of the writer's property after his death. Each of the entries quoted above which is signed by the deceased does either undertake to dispose of property of the writer after his death, or to control its disposition. Each entry, therefore, appears to be a will, and falls within the statute so far as this point is concerned, whether the language used be sufficient for the purposes intended or not,

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which is a matter of construction by the proper court after the testamentary character of the instrument is determined. The intention to confer some power or control on Dr. Pulliam, to give a bequest and legacy to Lucy Freeman, and to put his grave lot in good condition, after the writer's death, is clear.

It is conceded by the learned counsel for the appellants that the evidence is sufficient to sustain the trial judge's findings of all the other requisites of the statute as to the three entries signed by the deceased, except, he insists, the essential requisite that they were found among the valuable papers of the deceased. But the entries are embeded in the diary of the deceased, continuously kept by him, and in which he had made an additional entry, according to the proof, on the night before his death. Valuable papers, within the meaning of the statute, are not papers having a money value, but only such as "are kept and considered worthy of being taken care of by the particular person": *Marr v. Marr*, 2 Head, 306. Entries of daily transactions, whether on separate sheets of paper or in book form, preserved by the writer, and which the proof shows he directed his servant to deliver to the person selected by him to manage his estate after his death, would be valuable papers. If the testamentary papers in controversy had been written on separate sheets of paper, and deposited by the writer within the leaves of the book in which the diary was kept, it would scarcely be contended they would not be found among his valuable papers. For a stronger reason they must be so considered if

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actually written in the book itself and as parts of its entries. Moreover, the proof shows that this book was in the hands of the deceased on the night before his death, and was found, with other manuscript books of account in which the deceased kept his accounts as treasurer of the town of La Grange, and of certain secret lodges. These books were all lying upon a shelf of the washstand, within a step of the bed of the deceased, and where he seems to have been in the habit of keeping them. On the second day before his death, he had called his servant's attention to this book, and directed her to hand to it Dr. Pulliam in the event of his own death, which his diary shows he was daily anticipating. The proof is sufficient to sustain the finding of the trial judge on the contested point.

It is next insisted that it was error to adjudge that some of the entries were entitled to probate as a holographic will, and that an intermediate entry was entitled to probate as a will of personalty only, and then adjudge the four entries to be one will. This objection seems to be rested on the idea that a holographic will would be of a higher grade of solemnity than an informal will of personalty, and could not be revoked by the latter. But, with the exception of a nuncupative will under the provisions of the Code, sec. 2167, every will validly executed and published according to law must, to the extent of its valid dispositions of property, be treated as of equal grade. A later will, unless otherwise intended, is only a revocation of the provisions of a former will in so far as it makes a valid disposition of the same property. Any will

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known to the law which is valid as to particular property will to that extent revoke a former will no matter how executed. It was so held in *Greer v. McCrackin*, Peck, 301, where a formal will attested by witnesses was changed as to certain personalty by an alteration of a bequest made by a third person under the direction of the testator without the attestation of witnesses. Whether that decision was correct in so far as it set up the alteration as a valid will may admit of doubt in view of subsequent decisions: *Suggett v. Kuchell*, 6 Yer. 425; *Johnson v. Fry*, 1 Cold., 101. But there seems to be no reason to doubt its correctness as to the effect of the alteration if established as a will. A later holographic will would *pro tanto* revoke a prior will attested by witnesses, and a subsequent informal instrument, neither signed nor witnessed, if established as a will of personalty, would to that extent revoke both the preceding wills. All wills are of equal grade or solemnity if duly probated according to law.

A more difficult question is whether the unsigned entry of February 28, 1879, is sufficiently established by the proof as a will of personalty. The presumption of law is certainly against the testamentary character of a paper not executed by the party, and it is a circumstance against this paper that it is between entries of a testamentary character which are signed. On the other hand, a paper complete in itself as to its provisions, which shows on its face the intention of a party that it shall take effect after his death, may be set up as a will although neither written nor signed

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by the party: *McLean v. McLean*, 6 Hum., 452. And a will written by the testator's own hand although not signed by him, nor attested by witnesses, is good as to personalty, provided the handwriting be sufficiently proved: *Suggett v. Kitchell*, 6 Yer., 429. The direct point was raised by the facts in *McCutchen v. Oehmig*, 1 Baxt. 390, but apparently overlooked, because doubtless it was known that the personalty would be exhausted in the payment of debts, and the effort was to set up the instrument as holographic. The entry in controversy is shown by four witnesses to be entirely in the handwriting of the deceased. And the servant of the deceased testifies that on Wednesday night before his death on Friday morning, the deceased brought the book to her in which the entries are written, and told her to give it to Dr. Pulliam, and it would tell him what to do. We cannot say that there is no evidence to sustain the finding of the trial judge on this branch of the case.

Affirm the judgment.

Bryant v. Woods.

ZACK. BRYANT *et al.* v. JAMES E. WOODS *et al.*

HOMESTEAD. *Contracts before enactment of exemption. Bonds, official.* The relation between principal and surety, or between sureties themselves, and the rights deduced therefrom, originate in the execution of the instrument of suretyship and is substantially a contract by implication of law from the relation created by the execution of the instrument. Where, therefore, an official bond was executed before the passage of the homestead exemption, and a mortgage given on property to indemnify the sureties, the liability was created by the bond, and the homestead is not exempt, though default was made after the passage of the homestead exemption.

FROM GIBSON.

Appeal from the Chancery Court at Trenton. JOHN SOMERS, Ch.

W. A. COOPER, SPL. HILL and JONES & JONES for complainants.

JOHN S. COOPER for defendants.

DEADERICK, C. J., delivered the opinion of the court.

The only question presented in this record for our determination is, whether Mary Woods, wife of defendant, James E., is entitled to homestead in the house and lot conveyed to complainants in trust to indemnify them as his sureties.

In April, 1866, complainants, with others, became the sureties of said James E. on his bonds as commissioner and clerk of the county court of Gibson

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county. His term expired in April, 1870, and in 1871 he failed to account for money received while acting as clerk and commissioner, for sale of land ordered by the court. In 1872, Woods being insolvent, executed the deed for the house and lot to secure complainants, to the extent of its value, which is much less than the amount of their liabilities, a part of which they had paid, when this bill was filed, in November, 1875.

Mrs. Woods claims that the default of her husband occurred after 1870, and by the act of that year the house and lot occupied as a homestead, is exempt from liability for said claims.

The chancellor held that the contract out of which defendant James E. Woods' liability arose, was entered into before the enactment of the homestead law, and that defendant, Mrs. Woods, was not entitled to homestead in said house and lot, and appointed a receiver to rent out the same, and defendant, Mrs. Woods, appealed from said decree.

Judge Cooper, in the case of *Eberhardt v. Wood*, 2 Tenn. Ch. R., 490-1-4, cites numerous cases holding that the relation between principal and surety, or between the sureties themselves, and the rights deduced therefrom, originate in the execution of the instrument of suretyship, and is substantially a contract by implication of law from the relation created by the execution of the instrument. And this case was upon appeal affirmed by this court: 6 Lea, 467. See also, *Johnson v. Harvey*, 84 N. Y., 363.

The obligation or liability of the defendant, James E., to complainants, then, was created by his bond

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executed April, 1866, anterior to the enactment of the homestead law of 1870.

It has been repeatedly held by this court that a homestead is not exempt as against contracts made before the enactment of the law creating the exemption. The liability existed upon defendant James E. before the exemption law was passed, and by the same bond creating the liability, an implied contract was created with complainants to fulfill the obligations of the bond, and indemnify them against loss, and the property he then owned, not then exempt from execution, was and is liable for this purpose: Thompson on Home. and Ex., secs. 9 to 11, and 315.

There was, therefore, no error in the chancellor's decree and it will be affirmed, and the cause will be remanded for further proceedings.

TAX-PAYERS OF MILAN v. TENNESSEE CENTRAL RAILROAD COMPANY *et al.*

AND

CAYOR AND ALDERMEN OF TRENTON v. TENNESSEE CENTRAL RAILROAD COMPANY *et al.*

1. CORPORATIONS, MUNICIPAL. *Power to issue bonds.* Municipal corporations can only subscribe for stock in railroads and issue bonds under an act of the Legislature conferring the power or right to do so. If the act of the Legislature authorize bonds to be issued of a certain denomination and bearing a certain rate of interest, the municipal corporation has no authority to issue bonds for a greater denomination and an increased rate of interest.

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2. **SAME.** *Same.* An act of the Legislature which authorizes a municipal corporation to subscribe for stock in a railroad, and "to lay and collect taxes to pay interest on the bonds which may be issued," does not confer authority to issue bonds.

3. **SAME.** *Bonds.* Bonds, being issued without authority of law, are void; are not negotiable, and their possession gives no right to the holders to be repaid by the corporation the amount paid for them.

FROM GIBSON.

Appeal from the Chancery Court at Trenton. JOHN SOMERS, Ch.

T. E. HARWOOD and HILL & WILLIAMSON for complainants.

W. A. COOPER and L. W. TALIAFERRO for defendants.

TURNER, J., delivered the opinion of the court.

On the 19th of July, 1873, the board of mayor and aldermen of the town of Milan passed an ordinance, of which the first section is: "Be it ordained by the board of mayor and aldermen of the town of Milan, Tennessee, That the mayor be and he is hereby authorized and directed, in the name and for and on behalf of the town of Milan, to take one hundred and fifty shares of the capital stock of the Tennessee Central Railroad Company, of one hundred and fifty dollars each, and in payment thereof to execute and deliver on demand to said company the bonds of the corporation of the town of Milan to the amount of fifteen thousand dollars (\$15,000), of one hundred dollars each, negotiable and payable to bearer, having

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thirty years to run to maturity from the date of their issuance, and bearing interest at the rate of eight per cent per annum, with annual interest coupons attached, the principal and interest payable in New York City or Milan, and for the payment of said bonds and interest the one hundred and fifty shares of the capital stock hereby authorized to be subscribed for, and all dividends accruing thereon, and the faith and property of the citizens of the town of Milan are hereby pledged. The bonds aforesaid to be signed by the mayor, under seal, and countersigned by the recorder and registered by the recorder; also the coupons for the interest shall be signed by the recorder."

On the 1st of January, 1874, the mayor issued twenty of the bonds. About the 4th of March following he issued fifty-five bonds, and about the 14th of April he issued seventy-five bonds, all for one hundred dollars each, at eight per cent interest, and in pursuance of the ordinance recited.

On the 14th of June, 1872, the mayor and aldermen of "the *city of Trenton*," by the first section of an ordinance, provided: "Be it ordained by the mayor and aldermen of the city of Trenton, That the mayor be and he is hereby authorized and directed to subscribe in the name and for and on behalf of the city of Trenton, six hundred shares of one hundred dollars each of the capital stock of the Tennessee Railroad Company, and in payment thereof to execute and deliver on demand to said company, the bonds of the corporation of the city of Trenton to

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the amount of sixty thousand dollars, of denominations of from fifty to five hundred dollars each, negotiable and payable to bearer thirty years after date of their issuance. and bearing eight per cent interest per annum, with annual interest coupons attached; the principal and interest to be payable in the city of New York or Trenton, and for the payment of said bonds and interest the six hundred shares of the capital stock hereby authorized to be subscribed for, and all the dividends accruing thereon, and the faith and property of the *town of Trenton* are hereby pledged; the bonds to be signed," etc.

There were issued under this ordinance bonds to the amount of about \$17,000. .

These bills are brought to enjoin the demand and collection of the bonds, to have them declared void, cancelled and delivered up, etc.

It is claimed for defendant that the bonds are valid under sections 4, 5 and 15 of the act of the General Assembly, passed February 17, 1870, ch. 53, entitled, "An act to secure the completion of the Tennessee Central & Pacific railroad," as follows:

"Sec. 4. Be it further enacted, That for the purpose of aiding in the building of the Tennessee Central railroad from Fulton, on the Mississippi river, to a connection with the Nashville & Northwestern railroad at Huntingdon, the chairmen or presiding officers of the county courts of the counties of Lauderdale, Dyer, Gibson, Carroll and Crockett, if organized, shall have power and authority to make subscriptions to the stock of said company for such

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amounts as they may deem expedient, with the sanction of a majority of the justices of the peace of the respective counties and the approval of the citizens thereof, to be ascertained in such manner as a majority of the magistrates may direct."

"Sec. 5. That the subscriptions thus made shall be paid in the bonds of the respective counties, signed by the chairman aforesaid, of *one thousand dollars each*, and not having more than thirty years to run to maturity, bearing interest at the rate of six per cent per annum, payable semi-annually, at such places as may be designated by the county court, with coupons attached.

"Sec. 15. That the corporate authorities of the towns of Huntingdon, in Carroll county, Milan, Humboldt and Trenton, in Gibson county, and Ripley, in Lauderdale county, shall have the same power and authority to make subscriptions to the stock of the Tennessee Central railroad, and to lay and collect taxes within their several corporations to pay the interest on the bonds that may be issued, and to create a sinking fund, as is granted to the several counties by this act, in conformity with the constitution of the State as amended."

It is conceded that the towns could only subscribe for stock and issue bonds under an act of the Legislature conferring the power or right to do so.

If we grant that the 15th section does in fact confer the same powers upon the corporate authorities designated as is conferred upon the several coun-

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ties, then has the power been pursued? The power is, to issue bonds of "*one thousand dollars each, bearing interest at the rate of six per cent.*" The power claimed and attempted to be exercised in the one case is, to issue bonds of "*one hundred dollars each, at eight per cent interest,*" and in the other, to issue bonds of "*fifty to five hundred dollars at eight per cent.*" So far as we have been able to see, there is nothing in the actions of the two municipal corporations that refers to or claims to act under the statute cited. There is no similarity or relationship between the powers given and those claimed and attempted to be exercised. If the grantees of a power may, as was done in this case, decrease the denominations of the bond and increase the interest, for the same reason it may increase both. If it may issue a bond for \$50, or \$100, or \$500, at eight per cent, it may also issue bonds of \$1,500, \$2,000, or any greater or less amount, at fifteen or twenty per cent, or a greater or less interest, and if it may increase in the particulars indicated, it may go further and contract or expand the time for which the bonds are to run to maturity. If it may change the power given by the statute in one essential respect or provision, it may extend the change to another and to others, until it has changed it entirely and made a new and different one in its stead.

It is the rule in this State that powers, like the one before us, and which can only be derived in the way pointed out by the constitution and laws of the State, must be strictly construed and pursued.

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The next question is, does the 15th section give a power to issue bonds at all? It certainly gives the same power to make subscriptions as are given in section 4, but it does not provide for the issuance of bonds as in section 5. It makes no provision whatever for the issuance of bonds. All that is said upon the subject of bonds is, "to lay and collect taxes, within their several corporations, to pay interest on *the bonds that may be issued.*"

Whether the Legislature or the draftsman of the act had the opinion that there already existed a law authorizing the issuance of bonds, or whether it was intended to enact such a law at a subsequent day of the session, we cannot determine. Certain it is that no such then existed; that none such was subsequently made, and none such can be created by any reasonable intendment from the act before us.

The construction contended for by the defendants would be to alter the law and terms of the contract, or rather to make a new contract in conformity to law, for the parties.

As under the law of this State contracts of the character before us can only be made under a legislative authority, and as all persons are presumed to know the law, the holders of the bonds must be holden to have had notice of the want of authority to issue.

The question discussed is conclusive of the case, and makes it unnecessary to consider others which are subordinate to the main issue involved, *i. e.*, the authority to issue the bonds. We concur in the decree

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of the chancellor that the bonds are void, but reverse so much of the decree as refuses the prayer to order the bonds delivered up for cancellation until the holders are repaid the amounts they paid for them. The bonds being void, are not evidences of debt, were non-negotiable, and their possession, of itself, gives no right to the holders against the corporations of Milan or Trenton. If the bondholders have paid money for the use of these corporations, there may be a ground of inquiry in another direction.

The decree will be modified as indicated and affirmed with costs.

COOKE, J., incompetent, and did not preside in this case.

McCLELLAN, Trustee, v. MEMPHIS & CHARLESTON
RAILROAD COMPANY.

TAXES. *Assessment. Exemption.* A railroad was by charter exempt from taxation for twenty years, which ended in March, 1877. The taxes assessed for 1877 were assessed in April. The company paid a *pro rata*. *Held:* The company was liable for all the taxes assessed for 1877. When the taxes were assessed no exemption existed.

FROM FAYETTE.

Appeal in error from the Circuit Court of Fayette county. T. J. FLIPPIN, J.

McClellan v. Railroad,

H. C. MOORMAN for McClellan.

HUMES & POSTON for Railroad.

FREEMAN, J., delivered the opinion of the court.

The property of the company was regularly assessed for taxation for the year 1877, for county, court-house and school purposes, the sum being \$2,057.25. The company paid \$1,542.94, but claims to have been exempted from the balance of the assessment on the following state of facts:

The property of the company, by charter, was exempt from taxation for twenty years after the completion of the road; that exemption expired on the 28th of March, 1877. The amount paid in is the *pro rata* on the basis of the assessment for that year, from and after the expiration of the exemption, that is for the months of January, February, and up to March 28, 1877.

The statutes regulating assessment of taxes provide, substantially, that at the April term of the quarterly court of each county, annually the rate of taxation of property subject to taxation shall be declared by the court. Another section provides that all property shall be assessed to the owner or reputed owner on the 1st of April of the year of assessment.

The contention of the counsel is, that the exemption was in existence up to March 28, 1877, and therefore the assessment should have been *pro rata* for the balance of the year.

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We think this is not the true principle in such a case. It goes on the theory that taxes are a burden accruing and accumulating from the first of January of one year to the same period of the next. On the contrary, the theory of the statute is, that it is a gross sum to be ascertained at the period fixed, as the result of an assessment or valuation then made and this gross sum is to be charged or assessed to the owner or reputed owner at this date. The fact that the property owned, or reputed to be owned, by a party on that day, had by law been specially exempt from this burden in this case, can make no difference, as far as we can see, any more than would have been the case had the owner bought property in another State on the 28th of March, and then for the first time brought it into the county, or had owned property in another State up to this period, and then brought it to his residence in this State. In both and all the cases the law exempted it from taxation, or, at any rate, in the latter cases, it was not subject to taxation by our law; yet it is clear such property would be assessable for taxation after the first quarterly court in April, and to the owner or reputed owner on the first day of April of that year.

The provision of the Code, sec. 52, "that the word month means a calendar month, and the word year a calendar year, unless otherwise expressed," does not in any way effect this result. It only means that a year shall be twelve calendar months, whether you commence to count from January or July—nothing more.

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An intendment is in favor of the State in a case like the present; nothing is intended in favor of the party claiming exemption. This is now axiomatic. The party who claims exemption from the common burden must show a clear right in his favor, or else he must share with others the charge of taxation for the common benefit. When this charge is assessed or adjudged, or fixed by authority of law, no such exemption existed, and none can be given by intendment or construction in such a case.

The result is, the judgment is affirmed.

KEELY v. TURBEVILLE.

1. BUYER AND SELLER. *Representations. Fraud.* If representations are made by the seller at the time of purchase, which the buyer relied on and was thereby induced to make the trade, and these representations were false, and known to be so by the seller, this would be fraud, and would defeat a recovery upon a note given for the purchase money.
2. SAME. *Same. Warranty.* If the buyer relies partly upon an examination and test of the article sold, but mainly upon the representations of the seller, and these representations were with intent they should be relied upon, it is a warranty upon which he may recover.

FROM GIBSON.

Appeal from the Circuit Court of Gibson county.
J. T. CARTEL, J.

Keely v. Turbeville.

M. M. NEIL and JOHN S. COOPER for Keely.

CALDWELL & CALDWELL for Turbeville.

FREEMAN, J., delivered the opinion of the court.

This suit is brought on a note given for a mill pick, called a "diamond mill pick," purchased by Keely, the owner of a flour mill in Gibson county. The note is for one hundred dollars, the contract price.

The case was tried before the circuit court on appeal from a justice of the peace, where the case turned on three matters urged by defendant in resistance of the right of the plaintiff to recover. These defenses were, first, that the note was fraudulently obtained, as we take it, by means of certain representations made by the seller, of the capacity, quality and fitness of the pick for the work it was designed for, and the increased product of flour per bushel of wheat as the result of its use on the mill stones, as compared with stones dressed by the usual instrument—the steel pick.

Second, breach of warranty in reference to these same things, and a right to recoup by way of damages, the difference between the article as warranted, or represented, and its actual value.

Third, a failure of consideration.

This latter ground we do not understand to be seriously insisted on, if at all, and could not be. The party got the thing bought, there has been no failure of title, and he still retains it undisturbed,

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and no defect of title is suggested. We may lay this out of the discussion.

The case has been pressed on us for reversal for supposed errors in the charge of the court on the first two questions—fraud and breach of warranty.

His Honor charged, on the question of fraud, substantially, that if representations were made as to the pick at the time of the purchase, which defendant and relied on, and was thereby induced to make the trade, and these representations were false, and known to be so by plaintiff, this would be a fraud, and would defeat a recovery.

In a case like this at law, fraud in representing the character of an article offered to be sold, by which the other party is intended to be induced to buy, involves necessarily an intention to deceive, a purposed wrong. It has in it this affirmative element by the nature of the thing. This being so, and the theory of the defense, on which his Honor was instructing the jury, being that the party had, by making these representations fraudulently, wrongly obtained the note sued on, and therefore should not recover at all; that it was voidable for this cause in his hands; it follows that no such purposed fraud in obtaining the note could have existed without a knowledge on the part of the maker that the representations were false. If his representations were honestly made, believing them true, they could not have been made with intent to deceive the defendant, and thereby obtain the note on which the suit is brought. We therefore think his Honor was cor-

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rect on the question as presented, when he told the jury that fraud that would avoid the note and prevent a recovery by the plaintiff, because the promise had been obtained by fraudulent representations of the quality or character of the pick, was correct. Such purposed and planned obtention of the note would necessarily involve a knowledge of the fact that the representations were false, and could not consist with the idea of an honest statement, however mistaken, of what the party really believed to be true.

If his Honor had been called on to charge upon a right of recovery by defendant by way of recoupment for damages, in the nature of an action on the case for deceit—a tort—then a different rule might apply, and a representation intended to influence the conduct of the other party, and which did do so to his injury, made recklessly, without regard to its truth or falsehood, or without knowledge of whether true or false, might be such a tort as to furnish the basis of an action and recovery. The wrong done to the party is the same, whether the fact stated or representation made was true or false. We think this probably is the true line of distinction, which the authorities will be found to sustain. No such question, however, was presented, and we see no error in the ruling of his Honor on the case as it stood before him. See *Horrigan v. First National Bank*, 9 Baxt., 140.

The next question presented arises on this state of facts: After the jury had been charged very prop-

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erly on the question of warranty, they seem to have been unable to agree on a verdict, probably for several days. They had several times returned into court, and stated they were unable to agree on the facts of the case. They were, however, sent back by his Honor, when again they came into court, and presented in writing to the court the following: "Your Honor, we, the jury, would report to your Honor that we are disagreed on a question of law. If Keely, the defendant, relied mainly on plaintiff's representations of the pick, and partly on the partial test of the pick made by Turbeville, does that constitute a warranty?" To this his Honor replied in writing: "I charge you, that if you find the above from the evidence, it would not constitute a warranty." Before writing, however, he re-read to the jury his former charge on this question. When this was done, defendant's counsel, before the question of the jury was answered, presented his Honor, in writing, the following as their view of the law on the question propounded by the jury: "If Keely, the defendant, relied mainly on the representations of Turbeville, and Turbeville so intended Keely should rely on his representations, this would amount to a warranty, if Turbeville so intended it to be." This request was refused, and the charge was given as above.

It is proper to state, that the proof tended to show that the pick had been tried or used twice on the mill stones by Turbeville, or his partner, Drewry, in the presence of defendant, before it was

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purchased, and that while the test was not entirely satisfactory, it was explained that the full results of the use of the new pick could not be obtained until the impressions made by the use of the old style pick had been worn off, which would be some little time. It was in reference to this view of the case that the jury had put the question before us to the court.

The request of the counsel was proper to be made under the circumstances, his Honor being about to charge upon a point not specifically referred to in his former instructions.

His Honor's charge, then, taken in connection with what he refused to charge, means, that even though a party mainly relies on the representations made by the seller, and these representations were made with the intent they should be relied on and received as a warranty, yet if he in any degree relied or acted on tests of the article he had seen made, or knowledge thus obtained, still this would not be a warranty.

In this we think there is error. It amounts to saying to the jury, that even though the seller gives a warranty, which is the controlling inducement and reliance inducing the purchase, yet if the party should be influenced in any degree by his own observation of the article, or information obtained by having seen it used and partially tested, that the warranty thus given and relied on would be nugatory. We hold the opposite of this to be the law, and that, on this state of facts, as assumed by the

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question of the jury, and the request of counsel, there would be a warranty, for a breach of which a recovery could be had.

For this error the case must be reversed and a new trial had.

11L 345
14L 507

J. B. THOMAS *et al.* v. N. N. NORTHCROSS *et al.*

WILLS. *Construction.* A clause of the will provides as follows: "I give and bequeath to my oldest son, James A. Thomas, the fifty-five acres he now lives on during his natural life, provided he has no children, and if he should have children, I give and bequeath it unto them, and in case he should have no children at his death, it is to return back to my then living children, *unless* he should fail to pay Thomas D. Thomas a note of hand that I stood his security for \$150 bearing interest from date, and if he fails to pay the note, the said land is to be sold and pay it" *Held*, that the children of Thomas had no interest in the land, he having failed to pay the note. The estate never vested in the father, nor gave any right to the children, until the condition was performed.

FROM GIBSON.

Appeal from the Chancery Court at Trenton. JOHN SOMERS, Ch.

JOHN S. COOPER for complainants.

M. M. NEIL for defendants.

FREEMAN, J., delivered the opinion of the court.

There is a view of this case very earnestly pressed on us by counsel of defendants, which if acceded to

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is conclusive of the result as to these plaintiffs. They are the two children of James A. Thomas, and claim the land under the fourth item of the will of Jacob Thomas, their grand-father, they having been born some nine years, perhaps, after the will was made.

This clause is as follows: "I give and bequeath to my oldest son, James A. Thomas, the fifty-five acres he now lives on during his natural life, provided he has no children, and if he should have children, I give and bequeath it unto them, and in case he should have no children at his death, it is to return back to my then living children, *unless* he should fail to pay Thomas D. Thomas a note of hand that I stood his security for \$150, bearing interest from date, and if he fails to pay the note, the said land is to be sold and pay it."

It is clear James A. Thomas did not pay the note, and the land was attempted to be appropriated to its payment, by an arrangement between Thomas D. Thomas the holder, who was the executor of the will, by which the land was conveyed to him in satisfaction of the note, and some money paid by him to the father of these children.

The contention is substantially, that this estate never vested in the father, nor gave any right to the children, until the condition was performed, or if vested in the father, still the condition not being performed was divested, and defeated as to all parties by failure to pay the note.

After much consideration, we conclude this is the better construction of this item of this will.

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The gift is in, the previous part of the clause, but the condition is clear, and the intention certain, that if not performed, the land was to be disposed of under the will, or rather is disposed of by the will, and devoted to another purpose, inconsistent with the former estate giving either to the father or any children he might have, and in a way that necessarily defeated any estate that either might take under the will. In a word he disposes of it as his own property and specially charges it with this debt. Suppose the father had lived until the time of payment, and the son had failed to pay this debt, would it not be clear, that he would not have given him the land, but have appropriated to this debt, in the event he had intended it should thus be discharged? That he did intend it should be discharged by this land is the primary intention of the testator, and to make that intent effective, he has directed it shall be sold to pay it, if not paid by the son.

The son, James A., and the executor so understood the will as evident by the fact, that they both join in a conveyance by which the land is conveyed in payment of the debt, and the father of these children yields all claim to the land and removes to Missouri. The children's right did not stand higher than the father's under the will. Both were to exist as directed, unless the father failed to pay this debt. But if he did fail, then the testator's will was that neither should have it, and it be sold to pay it. This having been done, the primary purpose of the testator has been carried out and his will been effectuated.

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If the construction we have stated is the true one, then it makes no difference to these complainants whether the power was executed formally or regularly by the executor or not. They had no estate or rights to be affected by it, and therefore cannot complain or be heard to assert a title until they first show the condition was performed on which their right was to accrue, to wit, the payment of the note.

The result is the decree of the chancellor, for different reasons from those by which he rendered his conclusion, is affirmed, and the bill dismissed with costs.

B. SPRINGFIELD *et al.* v. M. L. JACKSON *et al.*

SALE OF REALTY. *Life tenant and remainderman. Appeal. Revivor.* S sold a tract of land to J, in which, under a will, his wife had a life estate, and, by the terms of the will, upon her death vested in her son. S, his wife and son, then of age, executed a title bond and afterwards a deed. Upon proper pleadings, it was held by the chancellor that the sale was void as to the wife. An appeal was taken, and before hearing the wife died. *Held:* That the sale was void as to wife, but she having died pending the appeal, the son was bound by the deed, and the sale was sustained.

FROM FAYETTE.

Appeal from the Chancery Court at Somerville. H. J. LIVINGSTON, Ch.

JONES & GALLOWAY and STAINBACK & RIDDICK
for complainants.

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H. C. MOORMAN for defendants.

TURNEY, J., delivered the opinion of the court.

In April, 1846, Boswell B. DeGraffenreid made his will. By the third clause it is provided: "There are now in the possession of my daughter, Elizabeth G., and her husband, Blount Springfield, ten slaves as a loan for the present, and I contemplate shortly to add two more slaves, making in all twelve, and settle them, with their increase from this date, and also with all that part of the Green B. Hamblett tract of land exclusive of the 30 acres assigned to my son Henry, upon trustees in trust to apply the annual proceeds of the labor of said slaves and use of said land to the support, from year to year, of my said daughter Elizabeth, and such children as she may have, independent of and not subject (the property or its proceeds) to the control, debts or contracts of her present or any future husband, and at her decease the same to go to her child or children that she may have, and the descendants of such, the descendants taking the part the parent would have done if living; and in default of such living child or children, or descendants of such, at her death, the property so given to her use to revert to my estate and be divided equally; that is to say, one-fifth part to my son Henry, one-fifth each to each of my daughters, and the remaining one-fifth part to my said grandsons Edward and Francis Long, or either; to Henry, his part in absolute title, and the remaining four-fifths to the trustees in this will

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named for the others, and upon the like terms and limitations and conditions as the other property specified for their benefit respectively. And in case of my decease before making such deed of gift, then I vest the said land and ten slaves and two others, which two I leave it to the discretion of my executor to select out of my estate, in the trustees hereinafter named, for others of my children, to-wit: Henry E. DeGraffenreid, E. T. Evans, L. H. Coe, Blount Springfield and Peter Bland, to be by them held in trust for the purposes stated."

In the last clause it is provided: "Whereas, in the foregoing I will about 306 acres of land to the use of my daughter Elizabeth, and also direct that one-fourth part of my home tract of land be allotted off in severalty to the use of such of my said daughters as first arrive at twenty-one years of age or marries, I have reflected that it may be better for them, and therefore authorize the trustees of each, if in the exercise of a sound discretion they may deem it best, to sell the land allotted to use of either, and apply the proceeds arising from such sale to purchase of other lands, which, when so purchased, is in all respects to stand substituted for the original."

B. B. DeGraffenreid died in 1856. No one of the appointees ever qualified, except the son.

On August 10, 1869, Blount Springfield contracted to sell to M. L. Jackson 846 acres of land. A title bond, signed by Blount Springfield and his wife, Elizabeth G., and their only child, Baker C. Spring-

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field, and who was of full age, was executed. In that bond the land is described as "846 acres, more or less, composed of one tract of 289 $\frac{3}{4}$ acres deeded to me by Wm. Harris, one tract of 156 acres deeded to me by R. Lemons, one tract of 300 acres known as the Green B. Hamblett tract, and one tract of 37 acres deeded to me by A. D. Steinbach." The bond proceeds: "On the following payments: \$5,000 to be paid cash on the 25th of December, 1869, at which time possession is to be delivered and given; \$5,000 December 25, 1870, and \$5,000 December 25, 1871. Now, if on the payment of the said several sums of money, I should make, or cause to be made, a general warrantee deed to said land, then this obligation to be void," etc.

The two notes first falling due have been paid. On the 4th of August, 1871, Blount Springfield executed a deed for 546 acres of the land, reciting payment of the purchase money. Springfield, wife and son join in a deed for the 300 acres, retaining a lien for the purchase money, which is stated to be evidenced by the last note before described for \$5,000. The notes were all payable to Blount Springfield, the husband and father. The title bond was filed for registration on the 11th of February, 1870, and registered on the 12th of March, 1875. The deeds were not registered until after the commencement of this suit.

On the 17th of March, 1871, complainant, Thos. G. Neal, loaned Blount Springfield \$1,200, and on the 12th of April, 1871, he loaned him about \$1,823,

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taking his notes. The \$5,000 of Jackson last falling due was pledged as collateral for these sums at time of borrowing. On the 18th of February, 1875, the balance of the note after Neal shall be paid was transferred by B. Springfield to Henderson Owen, surviving partner, etc. On the 27th of January, 1875, Jackson made a deed of trust to E. J. Tucker on the 546 acres of land, to secure certain creditors. On the 15th of March, 1875, the original bill was filed by Blount Springfield for himself and Neal and Owen, and by Baker C. and Elizabeth G. Springfield, to enforce the vendor's lien on the entire tract for the payment of the \$5,000 note.

Jackson by his answer admits the purchase and his readiness to perform, if the title to the 300 acre tract is good, or can be made so. He makes his answer a cross-bill.

At least five-sixths of the record is made of bills, cross-bills and answers.

The first question presented is, did Blount Springfield have the power under the will to sell and re-invest? We think with the chancellor that he did not, and that the sale was void as to the wife. Since the appeal to this court, however, Mrs. Springfield has died, and the title upon her death by the terms of the will vested in her only son, Baker C. Springfield, who was *sui juris* at the time he joined in the title bond and deed, was an attorney and the draftsman of many of the papers, especially the pleadings of himself, his father and mother, in this cause, in which he claims the sale was a very ad-

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vantageous one; that the father has re-invested of his own means largely more than the price of the Hamblett tract, in other better lands, and which are yielding a much larger profit. As he covenanted for title with a full understanding of all the circumstances, his deed and covenant will be held to convey the title cast upon him by the falling in of the life estate. In the case he presents himself as counsel and witness, changing base in either and both as interest may suggest to him. While his course presents him in no very favorable light, and while we can give him but little credit, it is evident from all the facts, including his bills, answers and deposition, that he was mainly instrumental in getting up and keeping up this litigation, as well as in promoting the sale of the land. He must not now be permitted to take advantage of his own wrong and frauds upon others.

It appears from the answer of Mrs. Springfield, her husband and son, that the profits from the reinvestment are greatly superior to those of the land devised under the will of her father. A strong *prima facie* case is made for ratification, if presented in a bill for the purpose. From their own standpoint we are forced to conclude that she received and enjoyed the use and rents of the reinvestment, receiving the full support contemplated by the will, and is thereby estopped to claim rents for the 300 acre tract for the time since Jackson became a bankrupt in 1878. But for her resistance to the cross-bill of Jackson, and concealment of what she in her later pleadings

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charges to be the fraud of her husband, she would have been restored to her rights in the land under the will of her father long before the bankruptcy of Jackson. Her coverture will not protect her from the consequences of her fraud upon the rights of Jackson. While, if she were living, we might be constrained to restore to her the land, we would not, under the circumstances, allow an account for rents.

Neal claims that he is entitled to subject the entire tract of 846 acres to the payment of his debts. As we have seen from the title bond, the sale was an entirety; he was the holder of the note before the registration of the deeds; when he took the note it was governed by the contract in the title bond; he was not consenting to the deeds, nor had notice of their execution, and is not affected by them, but is entitled to the terms of the original contract, which secured a lien upon the entire tract for the full amount of the purchase money. The transfer to Owen was made after he had notice of the existence of the deeds to Jackson, and after Jackson's deed of trust for the benefit of other creditors, and he must be postponed to them as to the 546 acres. The 846 acres will be sold in two parcels, or in more if practicable and desired by the deferred creditors, and Neal first paid out of the proceeds; then the trustee, Tucker, out of any excess in the proceeds of the 546 acres, and afterwards, if there is a balance, it may be applied to Owen's debt.

The unadjudged costs will be paid out of the fund before any of the debts.

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The 300 acre tract will be sold first, Neal having the security of the entire tract, and the creditors attempted to be secured in the trust deed being limited to the 546 acre tract, the latter should have the benefit of such sale as will be likely to produce the best sale, especially as no injury can result to the holder of the prior lien.

The decree will be modified as indicated.

11L 355
1pl 308
4pi 30

WILLIAMSON v. THOS. R. WILLIAMS, Adm'r, etc.

1. FRAUD. *Burden of proof.* The burden of proving that a deed from a father to a son is voluntary and fraudulent is upon the attacking creditor.
2. DEFECTIVE TITLE. *Presumption of knowledge.* The acceptance of a mere quit claim deed, or one with only a special covenant of warranty, is *prima facie* proof that the conveyee knew the title was defective.
3. NOTICE. *Lis pendens, Commencement of.* As to strangers to the suit, *lis pendens* does not commence until the service of process upon the defendant, even though a copy of the bill had previously been read to such defendant by a co-defendant who had been served with process.
4. FRAUD. *Evidence. Declarations of conveyor.* If a party makes a deed, and retains possession inconsistently with the deed, his statements in reference to the ownership, or contract or character of possession, are admissible against the conveyee; but it is otherwise when his possession is consistent with the terms of the deed or contract.

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5. FRAUD. *Innocent purchaser. Resulting trust.* Where property is fraudulently conveyed to evade creditors to an assignee, cognizant of the fraud, who conveys to an innocent third person, who pays a full consideration in ignorance of the fraud, the consideration paid takes the place of the land conveyed, and the mesne fraudulent assignee becomes liable therefor to the creditors of the original grantor.

FROM FAYETTE.

Appeal from the Chancery Court at Somerville. H. J. LIVINGSTON, Ch.

JONES & GALLOWAY for complainants.

H. C. MOORMAN, C. C. HARRIS and STAINBACK & RIDDICK for defendants.

FREEMAN, J., delivered the opinion of the court.

The original bill is filed to enforce a debt on which judgment had been had in favor of complainant against Young Montague. It seeks, first, to set aside a conveyance of 180 acres of land made by Young Montague to his son, P. A. Montague, of date May 21, 1866; and, second, a conveyance of another tract of 591 acres in Fayette county, made, as charged, to W. T. Jones; another tract of 80 acres is mentioned, but seems to be abandoned, as no proof is tendered in reference to it. These lands are sought to be subjected to the payment of complainant's debt, on the ground, as to the 180 tract, that the sale to P. A. Montague was made with the fraudulent intent to hinder and delay the creditors of Young Montague in the collection of their debts, especially

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complainant. As the basis for this charge, the fact is averred, to use the language of the bill, that P. A. Montague not only paid no consideration for said tract of land, but he had not the ability to purchase and pay for same. It is also added, he knew of the fraudulent purpose of the father, and participated in it.

We will dispose of this branch of the case first. P. A. Montague and the father were both dead when this bill was filed. Their heirs are the defendants. They answer, and deny in most positive terms the fraud charged and the inability of P. A. Montague, and add to this denial the statement that on the day of the purchase one of the sisters, Minerva, loaned him \$975—the consideration being \$1,350—and this fact is admitted by agreement of counsel in the record. The answer challenges the complainant to proof of the facts thus charged, and is sworn to, oath not having been waived by complainant.

There is no proof in the record sustaining the charge. As a matter of course it cannot be taken for granted to be true. The answers are responsive to the bill, and even if we assumed the facts, could not, or were not within the knowledge of the respondents, the heirs, yet certainly it makes an issue on which complainant held the affirmative, and was bound to make it good.

There is nothing in the case of *Alley v. Connell*. 3 Head, 580, when carefully examined, to the contrary of this conclusion. It is true it is stated in one part of the opinion that the alleged demand of

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Mrs. Connell, the mother, part of the consideration for the deed, was charged to be unfounded and fabricated for the occasion, and that the answer, in strong terms, asserted the contrary. It is then added, "there is no proof." It is evident, however, by this the court meant no witness testified on this question, for in the next sentence the facts are given on which the suspicion is based, which was the basis of the principle announced, that is, the claim was in the form of an account by the mother against the son, and "upon its face," say the court, "is suspicious, and the time and circumstances of its settlement tend to strengthen suspicion of its fairness." Some of these circumstances are stated in a previous part of the opinion. These circumstances of suspicion, which were held to be strong, were held to make it incumbent on defendant, by satisfactory proof, to show the payment of the consideration. It was not held that a mere charge in the bill, denied by the answer, raised such suspicion and compelled defendant so denying to make out his denial by satisfactory proof. The same is the case of *Smart and Wife v. Waterhouse*, 6 Hum., 158, to which the court refer for the proposition laid down.

We cannot sustain the chancellor's decree as to this tract, without assuming that a sale to a son, who is charged to have never paid anything, nor been able to do so, which is denied, and facts stated and proven tending to show very largely that ability, is to be held fraudulent. In fact this decree cannot be sustained, on this record, except by holding

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that a sale to a son, when attacked, is *per se* fraudulent, unless conclusively shown, even years after the death of the vendor and vendee, that the money was actually seen to have been paid—a thing next to impossible to be done in many, if not most such cases.

The decree will be reversed and bill dismissed as to this tract of land.

We need not notice the question made as whether the cause was at issue as to this class of defendants, though we incline to the opinion the chancellor held correctly on the subject. The question does not go to the merits, and we are not inclined to turn cases on such objections when the merits can be fairly reached on the record. As to the other parties, the cause was clearly at issue as to them, and involved an entirely different tract of land, so that the objection is clearly not good as to them, even if we are to understand it as made for them, as probably was intended.

The case made in the bill as to the 591 acre tract is this: It is first charged that a tract of land of 81 acres was conveyed by Young Montague to W. F. Jones on February 14, 1867, and that this conveyance was made to defraud his creditors, and avoid paying complainant's debt. It is then added: "The said Montague in like manner conveyed the 591 acres fraudulently to W. F. Jones; that said sales were made without consideration, and these lands were fraudulently conveyed by said Montague to the said Jones with intent and for the purpose of

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hindering, delaying and defeating the creditors of the said Montague in collecting their debts against him." It is not charged that Jones was unable to pay for this land.

It is then further charged that Jones, further to defeat the creditors of Montague, did, on the 13th of July, 1868, pretend to sell and convey to Wm. Wallace the said tract of land, Wallace being a son-in-law of Montague, and having knowledge of the fraudulent contrivances and arrangements. As evidence of the fact alleged, it is said—and the fact is that way—that Jones knew he had not a good title, because he conveyed only by a quit-claim deed; and also that Wallace knew that he had not a valid title when he purchased. All the charges of fraud are met by the answers with positive denials, and the quit-claim deed and purchase by Wallace thus explained: That Wallace wished to purchase from Montague, who told him he had sold to Jones; that he negotiated a trade with Jones, and it was agreed he (Wallace) was to be substituted as purchaser, and Jones released from the payment for said land, Wallace paying to Montague \$915 in a store account (Wallace being a merchant), and giving in addition his two notes for \$1,950, both due two years after date, to-wit, July, 1870, which Wallace says he has discharged and taken up, and will produce the same on hearing, if necessary.

While Wallace's denials of all knowledge that his father-in-law was indebted, and especially of complainant's debt, and his denial of fraudulent intent,

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is equally positive, still we are compelled to agree with the chancellor, that the proof overturns these denials by a reasonable preponderance.

First, it is not at all probable that a father-in-law would have sold and conveyed a tract of land of this kind fourteen months before, without his son-in-law, who seemed to have lived in the neighborhood, having heard of it. This he claims not to have done till he sought the purchase.

Second, he took only a quit-claim deed, or one of special warranty against Jones, or persons claiming under him. This is evidence of knowledge or suspicion of defective title, as held in *Hockaday v. Wilson*, 1 Head, 113; but as we have held in other cases, is not conclusive and may be explained. We see nothing in the facts that serve to explain the force of this fact in this case.

Third, Wallace says he had paid the notes given, had taken them up, and proposes to produce them as evidence if necessary in this case. We think it was very necessary, and his failure to do so weighs heavily against him, especially in view of the fact proven that the administrator of Young Montague swears that no such notes ever came to his possession, and he was appointed long before the time they fell due. Many inconsistencies, as well as contradictions, are found in Wallace's testimony, which might be pointed out to show that he bought the land fraudulently, as a device, no doubt, to aid his father-in-law in escaping from the payment of a heavy security debt.

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We now come to the last question on which the case as to this land finally turns. Wallace, on the 31st of August, sold and conveyed this land to J. C. Terry, a commission merchant of the city of Memphis, for \$7,000. Terry is brought into this litigation by a supplemental bill, filed November 18, 1871, and the charge added to the pleadings as to him is substantially as follows: That to aid in the fraudulent devices charged in the original bill, "Wallace pretended to sell and did fraudulently convey" this land to Terry, after your orator's original bill was filed, and after the writ of subpoena to answer had been served on him; and this sale and conveyance were made with the fraudulent design further to place said land beyond the reach of the creditors of Young Montague. It is also charged that Terry purchased from Wallace with full knowledge that said Wallace was selling and conveying the land to him to defeat the creditors of said Montague from subjecting the land to the payment of their debts.

The case made in the bill stands on these two grounds: First, a purchase after a *lis pendens*, by service of subpoena on the vendor; and second, that the sale was fraudulently made by the vendor, and that fraud known and participated in by the vendee.

The chancellor held the conveyance to Terry was ineffective on both grounds. We proceed to examine each on the facts shown in the record.

It appears, clearly, that the subpoena in the case was not served on Wallace until the 7th of September. The deputy sheriff so swears, the paper being

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lost, and this makes this proof competent evidence. The facts are, that a subpoena and copy of the bill had been served on a co-defendant of Wallace probably the latter part of August, and he had visited Wallace on Sunday before the sale on Monday to Terry, and had read the bill to Wallace. So that we have the case of a party against whom a subpoena was prayed but not served on him, with knowledge of the fact, making a sale to a third party of property specifically mentioned and sought to be reached by the bill, before service; and we may add, that third party having no notice of the fact that such suit had been brought, for the record makes this case.

Is this such a *lis pendens* as binds the purchaser? Unless otherwise provided by statute, the authorities all agree that the *lis pendens* commences with service of the process on the defendant to the suit, as to third parties at least: *Tharpe v. Dunlap*, 4 Heis., 586, and authorities there cited; *Murray v. Ballou*, 1 John. Ch. R., 576.

This is not an attachment bill, nor is it a bill under sections 4283, 4284, 4285 and 4286 of the Code—act of 1832—for the discovery of property or choses in action due or held in trust for him, the last section providing that in such a case the creditor has a lien on the property from the filing of his bill, or by registration of his judgment, under sections 2984 and 2985 of the Code, within sixty days.

The judgment was enjoined, but was dissolved and the party permitted to proceed in November, 1867;

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the bill filed in August, 1871, nearly four years after, and four years, lacking four days, after the return of *nulla bona*. The statute lien was gone by not selling in a year, at least, after dissolution of the injunction.

It is not the case of a party holding in trust, as contemplated by the act of 1832, where a discovery is necessary to develop the title, but the title as it stands is on the register's book, open and notorious to all; and so far from the vendee being a trustee for the vendor, the title is good and passes completely as between them, and no trust exists to be enforced, nor was ever contemplated, either secret or open. The vendee does not hold in trust for the vendor debtor, but has the indefeasible title as to him, and holds, if fraudulent, only subject to the creditors of the vendor in enforcing their claims.

It is simply the case of a creditor who had a judgment in the circuit court, on which there had been a return of *nulla bona*, and which had been enjoined for usury in the chancery court, when injunction was dissolved, after the above lapse of time, as to part of his debt, who then files his bill to enforce the collection of this balance against land charged to have been fraudulently conveyed. It stands under the head of equity jurisdiction for the removal of clouds on titles before a sale of property, and to set aside a conveyance fraudulently made constituting such a cloud and obstacle to the enforcement of a proper claim of complainant. As far as we can see, there is no special provision of the Code

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giving the lien beyond the rule of *lis pendens*, and entitling the complainant only to the benefit of this well established doctrine as settled in our law.

The doctrine of *lis pendens* in many cases operates harshly upon innocent purchasers, and can only be sustained on grounds of public policy, where private mischief must yield to public convenience: *Murray v. Ballou*, 1 John. Ch. R., 576.

This being so, whenever the case is within it, it must be enforced, but should not be extended beyond its settled requirements and well defined limitations.

It would seem to follow that Terry's title cannot be affected by this rule, as the party whose conveyance is to be defeated had not been served with process, and although he had knowledge of the fact that a suit had been commenced, to which he was party, still this is not such a *lis pendens* as should bind an innocent purchaser from him, without notice of the suit, if Terry be such. That he is, is sustained by his unequivocal denial in his sworn answer responsive to the bill, which is equivalent to two witnesses or one and corroborating circumstances, as well as his deposition most clearly sustaining this denial. There is no *contra* proof on this question.

The only other question, whether the sale was fraudulent, and whether that fraud was known and participated in by Terry. It is so charged. It is as positively denied by Terry in his sworn answer, the bill being unsworn, and so that answer must be met and overturned by two witnesses, or one with satisfactory corroborating circumstances.

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The facts bearing on this question are, that Terry was a member of the firm of Terry & Price, of the city of Memphis, and Wallace was a customer in good standing and credit with them: The commission firm was to be dissolved on the 1st of September, 1870, and be succeeded by Terry & Co. On the 31st of August, Terry says, he purchased this land as an investment, paying \$7,000 for it. He seems to have been negotiating such a trade for a month or more before, as he says he had ridden over the land then and examined it, and had the title examined by Mr. Shelton, a competent attorney at Somerville, who reported it good. He says, and the proof shows it to be true, that he paid for it by a check of the firm of which he was a member on the Union and Planters' Bank of Memphis, and this money is proven by the cashier to have been drawn on that day by Wallace on this check. Terry is charged on the books of the firm with the \$7,000 on his individual account, and appears on the same day to have been credited with the same amount on the books of the firm, as he says, he having made good his account out of his personal funds. This state of facts, in connection with some others we shall mention, are relied on to fix fraud on Terry. It is argued that Wallace's account with the firm at that date was \$3,169.05, and it is unreasonable this account should not have been included in this transaction. This would be so without explanation, but it is shown that \$2,900 of this sum is made up of two acceptances of the firm, given a short time before, having

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six and twelve months to run, and held by another firm in the city, and so there was only a small balance of a few hundred dollars in fact on the account, and that due the firm, not individually to Terry. These acceptances are shown to have been paid to the holders, or one of them, and possibly a part of the last one was paid to Price & Terry. Be this as it may, it might well be that the small balance due the firm might have been left open on the account of an esteemed customer, as Wallace is stated to have been.

It is shown that Wallace remained in possession of the land, perhaps moving on it soon after the trade. This is met by respondent by the fact that on the face of the deed he was to remain in possession until the 1st of January after the sale. It is said in Terry's answer that he gave him a power of attorney to act for him as his agent, and there is his proof that he was his tenant, and these statements are apparently contradictory. But they are explained by the fact that much of the land seems to have been bottom land, valuable mainly for its timber, which was sold to saw-mills, and Wallace acted under the power in selling the timber, as is shown, and collected the money, as is proven, as the agent of Terry, so receipting for it. Terry proves he was his tenant and agent to rent it, and as such, up to the time of his deposing, he had received from him, as such agent and tenant, \$3,210, besides improvements made on the place.

It is then sought to affect Terry by statements of

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Wallace made in 1870, while in occupation of the property, tending to show his purpose to avoid the present suit by his sale to Terry, with other circumstances tending to implicate Terry, such as the statement that he had deposited the price of the land with the firm, and had it there at the time. These statements are thought to be competent and to rightfully affect Terry, because of the fact that Wallace remained or was in possession of the property.

The principle of the rule invoked is thus given in the leading case on this subject—*Trotter v. West*, 6 Hum., 508: "If a party make a deed, and retain the possession of the property inconsistently with the terms of the deed, his statements in reference to the ownership, or contract, or terms upon which he holds possession of the property, may be received as part of the *res gestæ*; but it is otherwise where his possession is consistent with the terms of the deed or contract." See also 5 Sneed, 535; 1 Head, 548; 2 Heis., 353.

Now, it appears these statements were all made in the year 1870, after the sale to Terry, and by the terms of the deed, as we have said, possession was to be retained by Wallace until the 1st of January, 1871. In so far as the statements tend to affect Terry, they cannot be held to do so, being made in his absence, without his knowledge, and not by his vendor in possession holding inconsistent with the conveyance to him, but precisely in accord with the contract.

We have gone elaborately into the facts on which

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this case turns, in view of the fact that a chancellor, for whose opinion we have the highest respect, had held this transaction void, and counsel of ability have most earnestly maintained the correctness of that decree. We but add, that Terry, in his deposition, denies with emphasis all charges of fraud; and, if what he says is true, he is unquestionably an innocent holder of this property. We have given all the circumstances tending to show any complication on his part in the frauds of Wallace. No motive can well be seen for a merchant in his position to have gone into such a scheme. His buying land seems not to have been out of the course of his habit, as he shows he had made a much larger purchase sometime before this in Arkansas. There is no want of ability shown; on the contrary, while the firm seems not to have been a wealthy one, the cashier of the Union Bank says he would have cashed their overdraft of seven thousand dollars, or even to the amount of ten thousand dollars.

We have, then, the answer of Terry, in this case, denying every circumstance tending to implicate him. We have his deposition, equally positive, explaining the facts as we have given in this opinion. The question is, does the complainant make out a case of complication in a fraudulent purpose by a reasonable preponderance of testimony? No witness swears to a single fact showing actual notice of anything to affect Terry. All is to be inferred over his answer from the facts herein stated. In other words, do the entries on the books furnish both a witness and cor-

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roborating circumstances to overthrow the answer? for there is no witness who proves any fraudulent purpose on the part of Terry; all must be inferred from circumstances.

The result is, that complainant fails to make out his case against Terry, the purchaser of the land, and he must be held to be an innocent purchaser, without knowledge of the fraud, and, as such, the land protected from appropriation to complainant's debt in his hands.

The chancellor's decree subjecting this land will be reversed, and the amended bill dismissed as to Terry.

It does appear that Wallace purchased fraudulently, and disposed of this land to aid his father-in-law in evading the payment of his debt, and sold to Terry with intent to avoid the complainant's claim. He swears he received the price of the property to the amount of seven thousand dollars. He shows he had received this money, and this fact is beyond question. Having deprived complainant of this land, and having obtained its price, he must be held responsible by reason of this fraudulent disposition of the land, to be liable to the complainant's claim to the amount of the consideration by him received. This money stands for the land in his hands, and he cannot escape liability by having disposed of the land. It was so held in the case of *Marsh et al, v. Wills & Swan*, Thompson's Cases, overruling the case of *Tubb v. Williams*, 7 Hum., and the same principle, also, in *Coleman v. Satterfield*, 2

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Head, 265. These cases have been several times affirmed since.

The court in the Coleman case, 2 Head, 265, gives the principle on which this relief is given, as follows; "This measure of relief results upon either of two distinct grounds: First, that in consequence of his wrong, the estate is irrevocably lost to complainant; and second, viewed as a purchaser the party has acquired the property without any adequate consideration given for it."

This is precisely Wallace's case, and he has by sale obtained its value in money, and cannot be permitted to hold it in fraud of complainant's rights, which he has sought to defeat by such sale.

The result is, that a decree will be entered in accord with this opinion—a personal decree against Wallace for complainant's debt, not to exceed the price of the land.

Complainant will pay the costs in the court below of making the parties defendant as to the 180 acres of land, and as to his supplemental bill as to Terry, and all costs incurred as to that part of the litigation. Balance of costs in the court below and this court will be paid by Wallace.

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11L 372
13L 496

D. J. GUTHRIE v. LOUISVILLE & NASHVILLE RAIL-
ROAD COMPANY.

1. MASTER AND SERVANT. *Defective tools. Relative duties.* The duty of the master is absolute to use active diligence to prevent improper or unsafe tools or implements being furnished an employee by which he may be injured. The servant must use reasonable diligence in guarding against such injuries, but he may well rely, to some extent at least, on the faithful performance of duty on the part of his employer, and what might be ordinary care in avoiding an independent danger, might well not be required to guard against a breach of duty on the part of the master which the servant had no reason to anticipate.
2. SAME. *Same. Case stated.* Where a laborer upon a railroad, engaged in driving spikes, is furnished by the section-boss with an iron maul known by the section-boss to be defective, and is injured in consequence of such defect, the company is liable, although the defect was patent and would have been known to the servant had he inspected the maul.

FROM GIBSON.

Appeal in error from the Law Court at Humboldt.
J. T. CARTHEL, J.

McFARLAND & BOBBITT for Railroad Company.

COOPER, BUCHANAN & SPENCE for Guthrie.

FREEMAN, J., delivered the opinion of the court.

This action is brought to recover for the loss of an eye, by the use of a metal maul, by the plaintiff, while working as an employee of the company in driving spikes fastening down the rails on the track of the road.

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It is substantially averred in the declaration that the maul furnished plaintiff by the defendant was defective, and this defect known to the defendant, and that in the proper use of it, while engaged in his employment, under the direction of one Stewart, who was the agent of defendant, the plaintiff's eye was put out by the flying off of part of the head of the maul, and this occurred without the fault of the plaintiff, and by the fault of the defendant in requiring him to work with an insufficient tool.

This is a substantial statement of the case as made by the declaration, and which plaintiff was required to prove to the satisfaction of the jury in order to a recovery, the plea of the defendant being simply "not guilty." Under the instructions of the court, the jury found for plaintiff, and assessed his damages at \$2,500, from the judgment on which an appeal in error is prosecuted to this court.

The proof tends to show, and does show, that plaintiff was in the employ of defendant as a bridge carpenter, under the direction of one Stewart as section foreman controlling the work; that on the morning of the injury plaintiff had been engaged in sawing, and one Dual and Wilcox were engaged in spiking down the rails. The mode of doing this seems to have been, that the two worked together, the one driving the spikes on one side, his companion on the other, and they habitually rendered mutual assistance, the one to the other, in doing the work. A short time before the accident, the foreman (Stewart) ordered plaintiff to leave his sawing

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and take the place of Dual, and his maul to drive spikes, on the ground that plaintiff was a better hand at this kind of work than Dual, and he was in haste to have the work completed before a train should arrive, which was due in some two hours perhaps. In obedience to this order plaintiff took the maul of Dual, and proceeded to do the work he was doing, taking the maul without special inspection, and with no knowledge of any defect in it. After working half an hour or more, in driving a spike it was bent under a "T" of the rail, as the witnesses express it. When this was seen, plaintiff requested Wilcox, his fellow-workman, to aid him in straightening it, which was done by placing the small end of the maul between the spike and the rail, with the larger or face end turned out so as to be struck by the maul of his companion, the other holding his own maul by the handle, and the force of the blow would thus press the maul between the rail and the bent spike, so as to straighten it and enable it to be driven to its place. When the blow was given by Wilcox for this purpose, a "shiver," as the witness calls it, flew off from the face of the maul, striking plaintiff in the left eye, giving a very painful wound, from which it went out, and so is lost to the plaintiff entirely. It is said also by him that the other eye is weakened and injured, and that this is and would be the case is corroborated by the testimony of his attending physician, who testifies this would be the result of sympathetic action in such a case.

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The proof shows very clearly that the use of the maul spoken of was the most usual mode of straightening a spike in such cases, and was altogether proper in itself, and a safe way of doing it, and this was used properly, though a "claw bar" was also furnished by the company to be so used. But it is evident this was optional with the employees. In fact, the proof tends to show that the "claw-bar" was tried first in this case, but they were unable to straighten the spike with it, and therefore resorted to the mode stated, it being thus shown more effective for the purpose.

In addition, it is shown that knowledge of the fact that this maul had become impaired and needed repair had been communicated to the section foreman, whose duty it was to look after and direct the use of the tools, and who, in fact, had specific charge of the work as the agent of the railroad company.

It is evident on this statement of the facts, that if his Honor, the circuit judge, has correctly instructed the jury, the verdict is one that may well stand, and is abundantly supported by the evidence. Indeed, on the substantial facts stated above, there is no countervailing testimony, no witness being introduced by defendant to the contrary.

The only effort to break the force of plaintiff's testimony was by introducing two written statements, signed by witness Wilcox, one given to Stewart, the foreman, some days after the accident, and another in the form of a series of questions put by Mr.

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Buquo, an attorney of the road, in August after. These are supposed to weaken, if not contradict, the testimony of this witness. The first, we may say, presents nothing affecting the testimony. It is argued that in this statement the witness is made to say that while they were spiking down the rails together, the spike was "awkwardly" gotten bent under the rail, from which the argument is, that it was the awkwardness or misdirected act of the plaintiff alone which caused the injury. In this, however, the point at issue is mistaken. It is not whether the spike had gotten bent rightfully or wrongly, for their so getting bent seems to have been an usual incident to such work, but whether the use of the maul in its impaired condition was an act of carelessness on the part of the plaintiff, and so the company not responsible. The witness, however, swears that this word "awkwardly" was inserted without his knowledge, and not read to him. There was the clear, uncontradicted testimony of the plaintiff himself in addition, on which the verdict may well rest.

The other statement is unimportant, as far as we can see. Its main point is to show that a claw-bar would have been perfectly safe; that one was provided, and that it would suffice to draw any spike. But there can be nothing in this, as the whole proof shows that the maul was more convenient and more generally used for this purpose; and this is even corroborated by the statement itself. No order forbidding the use of the maul, or directing the use of

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the claw-bar in preference, is shown. We need not further notice these matters.

We have carefully examined the charge of his Honor, the circuit judge, in this case, and certainly find nothing in it of which defendant can complain. In fact, it is evident the learned counsel was well satisfied with it when put to the jury, as nothing more was asked, nor any modification of what had been said. Its propositions are, that it was the duty of the master, in a case like this, through its agents, to be careful, diligent and skillful in the selection of the tools that it furnished its servants to work with, and also in keeping them in repair after they are furnished, and the employee is responsible for any injury that results to the same, on account of the agents of the master in failing to comply with and discharge this duty, and failing to furnish servants with reasonably safe and suitable tools to work with. This general proposition, with the qualifications after given, is undoubted law, as applicable to this relation.

His second proposition was substantially that the employee undertakes to run all the ordinary risks of the service in which he voluntarily engages. After stating that these were the general rules, he then proceeds to specifically point out their application to the facts of the case in hand. He tells them, if the plaintiff was furnished this maul for work by the foreman, and that the maul was worn and defective, and the plaintiff's eye was put out by reason of this defective condition, in such employment, and

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the defects known by defendant or its employees, whose duty it was to look after the condition of the maul, or if said employees having such duty might have known of the defects and need of repair, by the use of such diligence and skill as a prudent and careful man would have used in attending to such a matter, the defendant would be liable.

He then defines the measure of care on the part of plaintiff by qualifying the above right of recovery, as follows: "Unless you find that the plaintiff also knew of the defect in the maul himself, or might have known it by the use of ordinary care and attention to it; or unless the injury was the result of the carelessness of the plaintiff as its proximate and efficient cause." But, he adds, "if you find the plaintiff knew of the defect in the maul, and that it was dangerous to use it, or that he might have known it or discovered it by the use of ordinary care and attention, and thereby have avoided its use, it was his duty to do so, and if he disregarded this duty, he could not recover, although in fact he did not know of the defect; or if the careless manner of the use of the maul by plaintiff was the proximate and efficient cause of the injury, then he could not recover."

These are the points of law on which his Honor submitted the case to the jury. We have given them mainly in his own language.

The first proposition, that it is the duty of a railroad company to furnish, in a case like this, safe and suitable tools, is sustained in principle by a

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number of our own cases. The rule has been laid down in reference to machinery, but the principle is precisely the same where the employee is employed in a service where the tools furnished by his employer are, by custom or usage, or by the actual practice of the employer, to be used by the employee. As to the duty so far as machinery is concerned, see case of *Nashville & Chattanooga Railroad Company v. Elliott*, 1 Cold., 613; *Railroad v. Carroll*, 6 Heis., 358; *Railroad v. Jones*, 9 Heis., 39; 3 Baxt., 427.

In the case of *Elliott*, 1 Cold., 617, after laying down the rule, that the servant takes the risks inseparable from his employment, broadly, the qualification is given from Redfield on R., as follows: "This doctrine, however, must be taken with the qualification that the employer must take care not to expose the servant to any risk by associating him with other servants wanting ordinary skill, or by the use of unsafe or unsuitable machinery, or other culpable negligence."

It is seen that this principle thus stated is more affirmative than the statement of his Honor, in that it is said the employer *must take care* that the machinery "is safe and suitable," and that the employee be not exposed to risks in this direction, or from other culpable negligence. Taking care involves the idea of an active duty imposed, the failure to perform which, when injury occurs, is such negligence as raises a liability for the damages resulting. This is the sound rule, and has been uniformly followed in

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principle, though not in the precise language quoted by this court.

On the second proposition, as to the duty of the employee, his Honor's charge was favorable to the defendant, for he excuses from liability if the defect was known, "or might have been known by the use of ordinary care and attention," or the *carelessness* of the plaintiff was the proximate cause of the accident. Now, in reference to a case like this, the true rule is, that the duty of the master is absolute to use active diligence to prevent improper or unsafe tools or implements being furnished an employee, by which he may be injured: 1 Cold., 613.

In reference to this matter the employee may well rely, to some extent at least, on the faithful performance of duty on the part of his employer, and therefore what might be ordinary care in avoiding an independent danger, might well not be required to the same extent to guard against a breach of duty on the part of another, which the party could have no reason to anticipate. The employee had no duty to perform, under the facts in this case, as to the repair of the tools; nor was he called on to inspect them to see whether the master might not have neglected his duties in this reference. There being no special care imposed by the nature of his position, nor obligation to inspect the tools, there could be no want of it, or negligence, or carelessness, in not doing what he was not bound to do by the nature of his employment and the legal obligations arising out of the relations existing between the

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parties. We do not intend by this, however, to say that the employee is not bound to proper attention, and bound to freedom from actual negligence in avoiding risks incident to his employment.

The defendant cannot complain that the employee did not suspect or anticipate a breach of legal duty on his part, nor watchfully guard against danger from such breach. It is not for him to object that the plaintiff has relied on his faithful discharge of his duty, nor to insist that he should have inspected the tools he was ordered to use for the purpose of seeing whether the master had not violated his duty. The proof shows he was ordered to take the place of Dual in this case, who was using this maul, and it was but natural that he should have done so without suspicion; and the failure to examine before using was not carelessness on his part.

The law applicable to this case might well have been qualified by his Honor in the way indicated. As charged by him the defendant certainly cannot complain.

We see nothing in the grounds furnished by the affidavit of surprise on which the case can be reversed. The fact of being able to draw the spike with the "claw-bar," or whether it was used before the maul, is unimportant, as the use of the maul is clearly shown not only to have been usual, but a legitimate mode of doing this work. We need not say more than we have said on this aspect of the case.

The jury, under the instructions of his Honor,

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have found the employer guilty of neglect of duty, and that the plaintiff had used ordinary care and diligence to prevent injury, and was guilty of no negligence on his part. These findings being sustained by the proof, the case must necessarily be affirmed.

LOUISVILLE & NASHVILLE RAILROAD COMPANY v. R.
B. HAYS.

1. EASEMENT. *Prescription. Essential elements.* A railroad company, by failing to keep open a ditch which ran alongside of an embankment constituting a part of its road-bed, accumulated the surface water in such quantities as to overflow adjoining lands, the owner of which made constant complaint, but delayed suit until more than seven years after the commencement of this wrong. *Held:* (a) Each overflow was a distinct trespass, which, being committed without any claim of right by the company, and without the consent of the owner of the overflowed land, could not establish an easement by prescription or limitation. (b) Twenty, and not seven, years is the period of prescription for an easement, such as a right of way or servitude of overflow. (c) A benefit accruing is an essential element in an easement, and no period of prescription can create a right to maintain a nuisance, which injures all whom it affects and benefits no one.
2. SAME. *Surface water. Relative rights of adjoining land-owners.* All lands are of necessity burthened with the servitude of receiving and discharging all waters which flow down to them from lands on a higher level; the owner of the lower land is liable when he, without grant or prescription, by artificial means, dams up the water and causes it to overflow the higher lands, and the owner of the higher lands, when he collects the water and pours it in a concentrated form or unnatural quantities upon the lower lands. This rule embraces rain and surface water as well as running streams.

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3. SUPREME COURT PRACTICE. *Innocuous error.* The Supreme Court will not reverse merely because the circuit judge has erroneously charged upon pleas in support of which no evidence was introduced.

FROM SHELBY.

Appeal in error from the Circuit Court of Shelby county. L. B. HARRIGAN, J.

ESTES & ELLETT for Railroad Company.

W. H. CARROLL, FLIPPIN & FLIPPIN and M. D. L. STEWART for Hays.

TURNEY, J., delivered the opinion of the court.

Defendant in error is the owner of a tract of land in Shelby county. Sometime anterior to the war between the States, the lessor of the plaintiff in error built a railroad embracing an embankment over and across the lands of Hays. At the time of the construction of the road a ditch was made on its side, which carried off the surface water. That ditch was kept open, and no damage resulted to the land until after the close of the war, when the ditch being neglected and allowed to fill up, the surface water from the hillside above the embankment overflowed about forty to sixty acres. In some years crops attempted to be raised on the land were entirely destroyed, and in others seriously injured by the surface overflow, or backwater, from the embankment.

This suit was instituted in February, 1878.

The facts of overflow and damage to crops are

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not denied, but it is insisted "that an easement to overflow the land had existed under an uninterrupted and adverse exercise of the right for seven years."

The facts are that repeatedly after the nuisance to the land began, complaints were made to the engineer of the road and to road-masters or section-bosses on the part of the road from which the injury resulted. That such complaint was made, together with the application to clear the ditch for the relief of the soil is in no sense denied or controverted by the record. During the time the complaints were being made the owner of the soil was each year, by himself or tenants, attempting to cultivate the land. The company for no purpose set up any claim of right, by either actual possession or sufferance, to the soil or to its use for any purpose. It was never once intimated that the rights of the railroad company for any cause or from any reason interfered with the right of the owner of the soil to its free, unencumbered and unembarrassed use. At no time did the railroad company, by word or act, give the land owner to understand that it had rights by prescription or limitation. On the contrary, it did, by its silence, confess the right of the owner to have his soil relieved of the overflow by the opening of the ditch, as was the custom of the company before the war.

By what rule of reasoning can it be held that a trespasser, who is repeatedly confessing that he is such, and never in any manner claiming a right, is protected by the statute of limitations, or by any rule of prescription?

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The case of *Heiskel v. Cobb*, 11 Heis., 638, is no authority for the railroad company. In that case Heiskel had the consent of the ancestor, Cobb, to build the dam. He also had the assistance of Cobb, who had given permission to use his bank in making his dam and encouraged him to do so. In that case there was an actual claim of right under the consent, or encouragement and recognition of the claimant of the soil, which worked an estoppel. In the present case the defendant company has not only always recognized the right of Hays to the soil, its use and products, but has never by word, act or deed claimed any interest therein for any purpose. On the contrary, the rights of Hays to the fullest extent have been recognized by silence and by acts intermixed in no way with any claim on the part of the company. So that it must result, even should we hold that seven years adverse possession was sufficient to create a prescription to overflow the lands of Hays and perpetuate a nuisance upon his land, still the facts of this case present no such question, and the charge of his Honor that twenty years adverse exercise of the right to overflow, etc., must be shown before a prescriptive right would exist, is not warranted or called for by the facts, and being immaterial to the issue will be disregarded by this court.

But suppose a prescription may give the right to perpetuate a nuisance, both to the corporation and the land-owner, and that it is immaterial that its existence does not confer a benefit, as this one does

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not, still no right by prescription or limitation has been created. In *Ferrell v. Ferrell*, 1 Baxt., 334, this court, speaking by Judge Freeman, says:

“The rule of a presumption of a grant from the State has been settled in Tennessee by several cases to be twenty years, and we think this rule may be as well applied to a right (of way) of the character now under consideration as to grants from the State. It is based on reasons of public policy and to quiet titles, and is a presumption of law in favor of a long continued possession” (citing several authorities).

“We think, therefore, these cases, recognizing the period of presumption of a grant, furnish a sounder analogy on which to fix the rule of presumption of a deed where it is to be made out solely by use or enjoyment of the right than the period of seven years in our statute of limitations as to real property.

“Perhaps we might hold with perfect propriety that these cases furnish evidence of the adoption of this period as the rule for presumption of a conveyance, required to be made by deed in all cases, when such conveyance is to be made out by enjoyment or use, without any written evidence of the inception of the claim.

“A sound policy favors this view, as the fact of a deed could readily be shown within the period of seven years, if the party had one, while it might well be lost, or evidence of its existence be unattainable in the longer period of twenty years, and therefore the right be wrongfully imperiled.”

This holding was made in view of our statute of

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limitations, and the principles of construction now insisted upon by the plaintiff in error were present in the minds of the court, and considered of and and passed upon by the court. For the strong reasons given they were rejected as being against public policy and unsound in practice. The case turned upon the construction of the statute. No sufficient reason is urged why that opinion should be overruled.

There is no one fact in the record to show that "an easement to overflow the land existed under an uninterrupted and adverse exercise of the right for seven years," or for any other length of time. If it shall ever become a rule of this court to reverse because the court below has erroneously charged the law upon pleas raising questions of law, and in support of which no facts are introduced, it will in many cases give to defendants justly liable an indefinite delay in having their responsibility fixed by judgment, as immaterial and impertinent pleas will be constantly interposed. It is perfectly apparent from the record that no thought of claim to overflow the land ever occurred to Hays or to the managers of the railroad until after this suit was commenced. Every fact and circumstance (important and unimportant) proves conclusively that no claim of any sort was ever asserted by the company or its agents against the claim of Hays to the absolute and unrestricted use of the land.

The construction of the ditch was with a view to drain the land, and that purpose was pursued until

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after the close of the war. Up to that period the railroad company recognized and obeyed its obligation to protect the lands from overflow, and has never since denied the existence of that obligation.

The record shows that no benefit—an indispensable essential in the claim to an easement—ever did or could result to the said road from the overflow of the lands. Since the commencement of this suit, the company (as it takes care to prove) opened the ditch, the witness saying: “I am frequently called on to open these old ditches of this sort; opened a ditch last spring south of the railroad company’s right of way through this land for the protection of the railroad, by order of the superintendent. The road-bed is low and damp.” We are aware of no rule of law that gives a right by prescription or long use to a nuisance that gives benefit to no body or corporation, but works hurt and inconvenience to all, even as in this case, to the creator of the nuisance. The water was injurious to the road-bed, and on that account the ditch was opened. Prescription is defined to be, the manner of acquiring property by a long, honest and uninterrupted possession or use during the time required by law. The possession must have been long-continued, peaceable and without interruption: Bouvier’s Law Dictionary. There has been, as we have seen, no such possession and use, in the case before us, for any length of time, either long or short, and we are satisfied the purpose to make the claim originated after suit was brought.

The next question is, is the company liable for

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damages resulting from an overflow by surface water?

In *Colcough v. Nashville & Northwestern Railroad Company*, 2 Head, 173, this court said: "The statutory remedy does not, however, contemplate or extend to damages or injuries to adjoining land not authorized by the charter, nor to damages resulting from carelessness, negligence or willful trespasses in the execution of the work." This language of Judge McKinney was approved in *Carriger v. Railroad Company*, 7 Lea, 389.

The damages in the case at bar is to land not contemplated in the statutory remedy, and result from carelessness, negligence or willful trespass in keeping up the road-bed. "Land cannot be cultivated or enjoyed unless the springs which rise on the surface and *the rains that fall* thereon be allowed to make their escape through the adjoining and neighboring lands. *All lands, therefore, are of necessity burdened with the servitude of receiving and discharging all waters* which flow down to them from land on a higher level, and if the owner or occupier of the lower lands interposes *artificial impediments* in the way of the natural flow of the water through or across his lands, and by so doing causes the higher lands to be flooded, he is responsible in damages for infringing the *natural* rights of the possessor of such higher land to the natural outfall and drainage of the soil, unless he has gained a right to pen back water by contract, grant or prescription. So if the proprietor of the higher lands alters the natural condition of his property, and *collects the surface and rain water together*

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at the bottom of his estate and pours it in a concentrated form and in unnatural quantities upon the land below, he will be responsible for all damages thereof caused to the possessor of the lower lands": Addison on Torts, p. 95. This principle was cited and approved in Carriger's case, 7 Lea, and applies to this case. It embraces rain and surface water, as well as running streams.

There can be in principle no distinction between the two kinds of water. The only questions arising are, has the conduct of the one party worked an injury to the property of the other? Has the railroad company, in the construction of its road-bed, or by its failure to keep it in proper condition, prevented the land-owner from using and enjoying his estate? Has it so altered the natural condition of its right of way as to collect surface and rain-water together and throw it back in unnatural quantities upon the land of Hays, and cause damage thereto? The facts conclusively show that all these things have been done and that damage has resulted. The railroad company has made itself a trespasser by its subsequent neglect to keep its property in repair, and is as much responsible for injuries resulting from that neglect as it would be for a failure, carelessness or negligence in the original construction of its road by which loss or damage was visited upon an adjacent land-owner.

The petition to rehear is dismissed, and the judgment of affirmance entered at the last term is reinstated.

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FUMBANKS, *et al.*

11L 391
14L 670
2pi 451
2pi 650
3pi 281

1. MARSHALING SECURITIES. *Homestead. Abandonment.* A conveyed by trust deed, two tracts of land, upon one of which A and wife resided, to secure debts owed B, C and D; A and wife subsequently conveyed by trust deed, releasing homestead, the same land and certain personalty to secure the debt owed B included in the first conveyance. *Held*, on bill brought by C and D; first, B having two funds for his security, while C and D had only one of them, would be compelled first to exhaust the personalty before sharing in the proceeds of the realty; second, though the second conveyance was not *per se* an abandonment of the homestead, the equitable title remaining in the conveyor, nevertheless, since complainants were entitled to have the second conveyance enforced and whatever right the trustee had under it sold, the purchaser at such sale would be entitled to possession as against A and wife; the result would be that the homestead, being a mere exemption and not an estate, would be extinguished and the purchaser under the first deed would get the benefit of it; consequently, the sale of the realty was ordered to be made as follows: (A) the tract upon which A and wife did not reside; (B) the tract upon which A and wife resided, first setting apart homestead; (C), if the amounts thus realized were insufficient to pay all the debts, then the tract upon which A and wife resided, absolutely and in bar of homestead.

FROM DYER.

Appeal from the Chancery Court at Dyersburg.
JOHN SOMERS, Ch.

M. M. MARSHALL, T. E. RICHARDSON and WATKINS for complainants.

LATTA, HILL and PARKS for defendants.

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FREEMAN, J., delivered the opinion of the court.

On the 1st of January, 1876, Fowlkes, his wife not joining in the conveyance, made a deed conveying two tracts of land in Dyer county, specifically describing the separate tracts, to S. R. Latta, trustee, to secure the payment of debts due A. L. & J. C. Fumbanks, Peter E. Wilson, Parr, Nolen & Co., E. R. Vernon and H. Clark. This deed was to run until the 1st of January, 1877, when, if the debts were not paid, the property was to be sold, and, after expenses of the trust, the proceeds to be applied *pro rata* to discharge the specified debts. This deed was duly acknowledged and noted for registration on 4th of January, 1876. On this day another deed was made by Fowlkes and wife, conveying the same tract of land to Latta, as trustee, together with several horses and other stock, to secure the same debt of \$1,510 due to A. L. & J. C. Fumbanks, that had been embraced in the former deed of trust of the 1st of January. This second deed of trust was noted for registration a short time after the first. Afterwards, in October, 1879, neither of the other deeds having been foreclosed, Fowlkes conveyed several growing crops of corn and cotton directly to A. L. & J. C. Fumbanks, to secure the payment of this debt, authorizing the trustees to sell the same publicly or ship, as they might deem best, and apply the proceeds to the payment of the debts. These conveyances are known as exhibits A, C and D.

The matter standing thus, in January 1880, S. R.

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Latta, at request of Fowlkes and Fumbanks, advertised the land for sale under the first deed of trust, announcing that he would sell the whole land as one tract, and subject to homestead. It is proper to say that the tracts lie adjoining, and had been used as one farm by Fowlkes for a number of years, he and family residing on the farm. Under this state of facts, complainants, the other creditors secured by the first deed of trust, filed this bill enjoining the sale by Latta of the land, and setting up several equities as against A. L. & J. C. Fumbanks, asking, upon their determination, that the land be sold and proceeds appropriated to the payment of the debts in accord with the prayer of the bill.

The main theory of this bill is, that A. L. & J. C. Fumbanks, by taking the later securities for their debt, were obtaining in some way an unfair and unconscientious advantage and preference over the other parties secured with them by the first deed, and that this ought not to be permitted by a court of equity. What this advantage is, so far as the land in the second deed of trust is concerned, it would be difficult to see in any view that may be taken of it. It was a conveyance made and registered after the first, therefore subordinate to it, as to all the rights conveyed under the first deed, and could in no way override the previous rights acquired. We know of no principle of law or sound justice in such a case that forbids a creditor, when he has obtained one security for his debt, if he deems it inadequate, obtaining additional security that shall make it safe. The fact

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that other parties have an interest in the first security taken, may furnish a good reason for desiring additional security, because it to that extent lessens the value of the security already obtained.

The real equity, however, made by the facts stated in the bill, and asserted as secondary ground of relief, though not with strict accuracy, is, that complainants have but the one security to which they can resort for satisfaction of their debts, while defendants, having an interest in that also, yet have obtained and hold two others, and should be compelled to resort to these first, before going on the fund in which the complainants have their sole rights, and then come on the common fund only to the extent of the balance of their debt unsatisfied, after exhaustion of the other and individual securities taken and held by them.

The question is, can this equity be sustained on the facts stated?

The doctrine on this subject may be thus stated: "Where parties, whose legal rights being confined to one fund, would fail to obtain satisfaction of their just claim if left to the course of law, equity interferes in order to afford complete justice by means of what is called marshaling of assets, which is such an arrangement of the different funds, under administration, as that they may as far as possible, without injustice, be applied in satisfaction of the various claims, notwithstanding certain parties have a right to priority of satisfaction out of some one or more of such funds: Wait's Actions and Def., vol. 3, p. 174. As if A has a mortgage upon two different pieces of property,

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and B has a mortgage only upon one of them, B may compel A to take satisfaction out of one of them when it will not prejudice A's right to do so: *Ibid.*, 175; or, as the principle is better stated by Chief Justice Marshall, 1 Brock, 266, cited in Law Cases in Eq., vol. 2, p. 218, "a creditor having his choice of two funds, ought to exercise his right of election in such manner as not to injure other creditors who can resort to only one of these funds." This is precisely a case within the principle. A. L. & J. C. Fumbanks have a security for their debt under the first mortgage or deed of trust on the lands conveyed. Complainants also have an interest in this mortgage in proportion to their debts. The first parties, however, have obtained and hold two other deeds of trust on personalty (laying out of view for the present the second conveyance of the land), and as against these securities these complainants have no rights whatever. It is but justice that the creditors having these additional securities shall be compelled to resort to them, and exhaust them before going on the other fund, which would certainly lessen their security to the extent the fund should be appropriated to the doubly secured debt.

It is true this equity is cautiously administered, so as not to trench injuriously upon the contracts of parties or do wrong to the creditor. But when thus qualified, it is one of which no one can complain. In fact it is but little more than the principle of requiring a creditor, who has a debt entitled to share in a fund where others have a like interest with him-

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self, to allow actual payments made on that debt, so that he shall only share in the common fund to the extent of what is actually due him. The only difference between that case and this is, that he has the means of payment placed at his disposal by the other property appropriated specifically to this purpose, and the court but enforces its sale and appropriation, as agreed between the parties. If he had enforced the securities in his hands, over which he has sole control according to the terms of the deeds, and realized the money from the sale, he would be compelled to reduce his debt by the sum so received before receiving a *pro rata* of the common fund. If compelled by the court to do what he ought to have done, and he receives the full benefit of the securities he has taken, he cannot complain nor be injured, and his co-creditors will be benefited.

We therefore hold, that complainants have the right to have the personalty conveyed in the subsequent deeds of trust sold, the deeds enforced, and the proceeds applied upon the debt of defendants as a credit, before they can go on the common fund under the first deed of trust. The sale of land under the first deed of trust, however, need not be delayed, if it shall be seen that it will take all the property in all the deeds to pay the debts secured, as the purpose is simply to have the proceeds of the property conveyed under the second deed of trust appropriated to respondents' debts, before appropriation of the fund arising from a sale of the land among the common creditors secured by the first deed, so that A. L. & J. C. Fumbanks

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shall only come in on that fund for the balance due them after the appropriation of the proceeds of the other securities. Their debt will also be credited with any sums paid on it by Fowlkes, or in any way realized by them.

In administering the equities arising under these trusts, it is the duty of the court, so to decree as shall best serve the rights of all the parties, the debtor as well as the creditor. We think, with that view, the court should, in making the sale of the land conveyed, sell the separate tracts, selling first the tract on which Fowlkes and family do not reside, and then, if necessary, the other tract, or so much as may be necessary to pay balance found due the creditors. In selling this last or residence tract, the court may, if desired by Fowlkes and wife, first lay off the homestead, and then the tract may be offered with the homestead reserved, and if this with remainder, after homestead expires, will pay balance of debts secured by first deed, after the other securities have been applied, to A. L. & J. C. Fumbanks' debt, then the homestead shall be preserved; but if not, and the entire interest will be necessary to pay the debts charged, then the tract will be sold not subject to homestead, or including the homestead right, as extinguished for reasons hereinafter given.

As to the effect of the second conveyance, by husband and wife, in trust to secure the debt of respondents, we need but say, that under the case of *Crook v. Lunsford*, 2 Lea, 238, the conveyance by an absolute deed and surrender of possession, by husband and

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wife, is an extinguishment of the homestead right, and so the first assignee of the land was held to have the land free from the homestead right. This being so, although the second deed in this case is not an absolute title in equity, but only a security for the debt, the equitable title still being in the conveyor, and the possession not surrendered, would not be *per se* an extinguishment of the homestead as by an abandonment or absolute sale. Nevertheless, as complainants would be entitled to have this deed enforced, and whatever right the trustee obtained sold, and the purchaser would be entitled to possession, as between him and Fowlkes and wife and the trustee, the result would be, that the trust being compelled to be executed, the homestead would then be extinguished, and thus the purchaser under the first deed would get the benefit of the extinguishment. It would be a useless expense and form to make such a sale, by which the purchaser would get nothing. It seems somewhat contradictory, at first thought, that a party claiming under a deed from the husband alone, which did not carry the homestead, should get the benefit of that homestead by a conveyance subsequently made of the homestead by husband and wife, and the conveyee get nothing. But this is probably the only logical result of our cases, which go on the theory that the homestead is not an estate in the land, but a mere right of occupancy or exemption, and, when voluntarily abandoned, or parted with as required by law, ceases to exist. This being so, a party having a prior conveyance of the land subject to homestead,

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would necessarily hold under that title free from the homestead, subsequently abandoned or conveyed, or released by the wife joining in a deed with her husband. The enforcement of this second deed of trust necessarily extinguishes the homestead right conveyed by Fowlkes and wife, and its enforcement is the right of the other parties secured in the first deed.

The result is the chancellor's decree, dismissing complainants' bill, is reversed; the costs of this court to be paid by complainants, the costs below as adjudged by the chancellor.

The case will be remanded to be proceeded in under this opinion.

STATE OF TENNESSEE for use of Henning's heirs v. J.
S. KELLER *et al.*

11L	399
116	67

1. CHANCERY JURISDICTION. *County Surveyor. Action on official bond.*

Chancery court has jurisdiction of an action against a county surveyor, on his official bond, for failure properly to survey land sold by the acre; and where such bill is brought by the vendor, against whom the mistake was made, he may recover the fees paid by him for the erroneous survey, any costs incurred in the assertion of his rights against the vendee, and if the excess beyond the number of acres intended to have been sold has been lost, *semble*, he may recover, also, the value of such excess.

2. PLEADING. *Amendment. Limitation.* A misdescription of the suit in which the erroneous survey was made is immaterial, and where the bill containing such misdescription was brought within six years from the survey, an amendment properly giving the title and purpose of the suit, made more than six years after the survey, relates to the filing of the bill, and the action is not barred.

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3. SALE BY ACRE. *Mistake. Excess.* Where in a sale by the acre there is, by mistake, a substantial surplus above that intended to be bought and sold, the purchaser will be compelled to pay for or return such surplus.
4. SAME. *Same. Same. Chancery pleading.* When there is such a surplus in land sold by judicial sale, the remedy is by an original bill, and not by a bill of review, after confirmation and complete vestiture of title, and after confirmation but before vestiture of title, by a supplemental bill.
5. SAME. *Same. Liability of surveyor.* There can be no recovery against the surveyor making such mistake, for the value of such surplus, when such surplus can be recovered from the purchaser.

FROM LAUDERDALE.

Appeal from the Chancery Court at Ripley. H. J. LIVINGSTON, Ch.

W. STRONG and W. E. LYNN for complainants.

STEELE & STEELE for defendants.

FREEMAN, J., delivered the opinion of the court.

This bill is filed to hold Keller, as county surveyor of Lauderdale county, and his sureties responsible for a failure to properly survey a tract of land, in which the widow's dower was ordered to be laid off by three commissioners, and balance divided and sold for partition of the proceeds among the heirs of a deceased party, the proceeding being had in the county court.

The clerk proceeded to have the land surveyed by Keller into six tracts, and sold the tracts in accord with said survey. One tract, represented by said survey to contain 125 acres, was sold, as charged in the bill, by the acre to J. T. Caine at \$22.07. This tract, however, turns out, as is conceded, to contain

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155 acres. Complainants sue to recover for the value of the surplus over and above the 125 acres at the agreed price, on the ground that they have by mistake lost this much land.

The sale was made January 12, 1871, and confirmed February term after.

The first question presented is raised by demurrer to the jurisdiction of the chancery court.

The suit is for breach of the official bond of the surveyor, which, by Code, sec. 436, is conditioned "for the faithful performance of his duties as surveyor." It is urged that this cause of action is not within the jurisdiction of the chancery court under the act of 1877, increasing that jurisdiction, but is purely an action for tort, and the recovery unliquidated damages.

We have held, however, at the present term, in the case of *Glenn v. Moore*, 11 Lea, 256, that a clerk of the circuit court was liable on his bond for failure to take proper surities on *supersedeas* bonds, whereby a quantity of wheat levied on by an execution was released and its proceeds lost. We are unable to distinguish that case in principle from this. Then the measure of recovery was the value of the property released by the wrongful act. In this, if the theory of complainant's bill be maintainable, it is the value of the land of which they claim to have been deprived by the sale, in excess of the amount shown by the survey made by the county surveyor. The tort is waived and the debt sued for, as is implied in the plea of the statute of limitations of six years urged by defendants.

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It is not a case for injury done "to person or property" within the language of the statute, as in the case of a trespass, to the one or the other, but is the case of loss accruing by reason of alleged breach of duty, which is measured by the value of the property assumed to be lost, and that is a matter of easy computation in the chancery court, by the ordinary mode of reference to the clerk.

The next question is, as to statute of limitations, based on the idea that an amendment was allowed to be inserted describing the suit, in which the survey was had, correctly, there having been a misdescription in the original bill. That bill charged that the proceeding in the county court was a petition by the widow for dower and the partition of the lands of her husband. It turns out that the suit was in fact by a part of the heirs and against the widow and other heirs, and the chancellor allowed an amendment stating the facts as they were.

This was not the introduction of a new cause of action, but only one that more certainly described the proceeding out of which the original cause of action grew. The survey was made of the veritable land now involved, and this survey is the gist of the complaint, not the precise title of the suit in which it was done. There is nothing in this point, and this defense fails.

This brings us, however, to the main issue on the merits. Have the parties suffered a legal loss, or been deprived of the land included in the survey, in which it is conceded there is the mistake alleged?

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The mistake is charged to have been discovered by a re-survey of the land, and report made in a case in which the administrator of the purchaser, Caine, sought to have the land sold; said report was made May, 1875, about four years after the survey.

. It is distinctly charged in the bill that the sale to Caine was made by the acre, and the recovery is sought for the amount involved in the mistake at the rate at which the land was then sold. In a word, the theory of the bill is, that the parties have been deprived of this amount of land by the error of the surveyor, by reason of the fact that, when sold, the title was conveyed to the purchaser of the entire tract, and they thus deprived of the same.

Our cases settle the rule to be, that where there is a sale by the acre, and a substantial deficiency in quantity, the purchaser will be entitled to an abatement for the deficiency: *Miller v. Bentley*, 5 Sneed, 671; 1 Head, 237; 4 Baxt., 228. It would seem to be a correlate of this rule, that if the purchaser by the acre, by mistake obtains a substantial surplus over and above what he supposes he buys, and the other party supposes he is selling, that he should not be entitled to retain this advantage. The rule should be of equality as to both vendor and vendee. So it was held in the case of *Barnes v. Gregory*, 1 Head, 237. Relief was also given in like circumstances in *Horn v. Denton*, 2 Sneed, 125, and *Williams v. Bradley*, 7 Heis., 55. From these cases it is clear the parties, on the statement of facts as charged, could have either compelled the purchaser to pay for the surplus in-

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cluded by mistake in the boundaries as shown in the survey, or to have had the surplus decreed to them as was done in *Williams v. Bradly*.

These principles conceded, it follows that complainants had not been deprived of the legal right to this land in 1875, when they discovered the mistake, and so had legally not lost it as the result of the mistake in the surveyor. Had the statute of limitations run against their right, and they been without fault in not discovering the mistake sooner, the case might have been different.

The complainants are entitled to recover the costs of the erroneous survey, and if they had been compelled to sue for the assertion of their rights as to the excess of land, the legitimate costs of that suit might have been recovered, and so they would have been made whole and received the proper compensation for the wrong done them. They have not brought such suit, however, therefore cannot have the latter relief.

It being settled that a party purchasing by the acre is not entitled to retain a surplus such as is found here, but must pay for it at the rate paid for the number of acres actually bought by him, the question is, what remedy has he in the case of a judicial sale, after confirmation and divestiture of title? In the case of *Horn v. Denton*, where the above relief was given after confirmation, but before divestiture of title, the proceeding was by supplementary bill or petition in the case, making the purchaser a party, he answering the allegations, and proof being

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taken. The writer of this opinion is unable to see why the fact that a final decree has been made divesting title should make any difference as to the rights of the parties. It might as to the mere form of the remedy, or rather name of it, as it is named a supplementary petition in that case, but in fact was simply a new bill filed against the purchaser, seeking to set up an independent equity against him. The sale had been completed by confirmation, and the purchaser entitled to demand the title to all he had purchased upon payment of the purchase money. What good reason there can be why this equity might not as well be asserted, upon allegations showing the facts after complete execution of the contract, as well as before, I am unable to see.

It may well be doubted whether in strictness or at all a bill of review would lie in such a case. The purchaser is not a party to the original cause, is only a *quasi* party, that is for certain purposes incident to his purchase, as for enforcement of purchase money, or subject to any decrees that might be necessary in order to complete his purchase. Be this as it may, however, the parties might find difficulties in bringing themselves within the requirements of a bill of review. There is no error in the face of the decree. No new matter has arisen in time since the decree. Is there new testimony come to light after the decree, which could not possibly have been used when the decree was made? This is the only other ground for a bill of review.

The fact of the boundaries of the land, with all

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the lines definitely set out, is on the face of the decree, and from these the amount of acreage might readily have been ascertained, and so it was possible to have had this proof before the former decree.

The fact is, there was no adjudication of the court, and no issue as to the number of acres. It is recited the tract contained 125 acres it is true, but there was no pleading raising the question. If the case should be reviewed, and the decree be set aside, it would only be upon such allegations as would have been proper in a petition to set aside the clerk's report, and have a resurvey, suggesting the error in the report. This would be original and new matter, on which, under the Horn case, 2 Sneed, an issue might be made and proof taken. But no such issue was involved in the original case. And so it is not seen how the production of evidence, showing the error in the acreage of land, can be held new evidence appropriate to and bearing on any issue made in the case in which the decree was made. New evidence, in the sense of the rule as to bills of review, certainly means new proof bearing on the questions at issue before the court, and which, if it had been before the court, would have produced a different decree. The fact now under discussion could only have been produced to support a new issue to be made by the parties.

The parties certainly were entitled to some remedy on the facts shown. The purchaser was certainly not entitled to have, under his purchase by the acre, thirty acres of land which he did not pay for.

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Why stand on the mere *form* of the remedy, if the right is clear? Why not allow a bill in chancery stating the facts, which would leave the former decree untouched, but only require payment for the additional land obtained by the mistake of the third party? There would be no reversal of the former decree, only a suit for money due for land, on allegation of a state of facts to be made out on an issue between the parties, which facts, if shown by our decisions, and in equity and good conscience entitle the party to the relief. We must hold this, or hold that in judicial sales a party is entitled to any amount over and above what he purchases, if by mistake the boundaries should include such a surplus. This, where the land is sold by the acre, is absurd, and an injustice that no technical logic can justify in any system of enlightened jurisprudence. It is said, however, that a decree of a court has vested him with the title to the land, and it must stand until reversed by some appropriate proceeding for the correction of the error. But this is no error in the decree, for all its assumptions of fact appear well supported from the record. The error and wrong is to be made out *dehors* the record, and by an independent investigation. Therefore the doctrine of immutability of decrees unappealed from has no application whatever. It is not a matter to be reached by any proceeding for correction of errors known to our law. It is a wrong done, however, a legal wrong, an advantage obtained, inequitable and against conscience, and therefore should be corrected or remedied. The remedy of an independ-

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ent proceeding on the facts is easy, natural, does no one any wrong, and enforces a clear right. Why should it be put aside by mere technicalities, based on the sacredness of decrees of courts, especially when the remedy can be given and the decree remain intact as before?

It is said, however, the remedy is clear against the surveyor. That is true, but, to make it so, you must assume the parties have none for the land, or else the wrong of the surveyor has worked them no legal injury beyond the cost of the survey. The remedy against the surveyor is based solely on the assumption that by his act the land has been lost, and this assumes that the vendee is *entitled* to the surplus, a proposition directly in the face of our decisions. The fact is, the whole difficulty is in the hesitancy in adopting or adapting a remedy. The right cannot be denied. That remedy is, as we have said, easy, and can work no one wrong.

In much of the argument, however, we think the nature of a decree vesting title to land, under our system is overlooked. The act of 1801, Code, sec. 4484, providing for divestiture of title, provides such decrees shall have the force and effect of a conveyance executed in due form of law, and by Code, section 4105, when the land is sold, as in this case, at the instance of the parties, the decree or deed of the clerk implies a covenant of seizin and warranty of title by the parties whose interest is sold, unless otherwise provided in the decree.

These provisions show that such a decree stands

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as a conveyance by the parties, and is but a mode of transferring the title by the parties through the agency of a court. If so, why not apply the same rules to such a conveyance, as in case of private sales? No good reason appears to the contrary, as far as I can see.

The summary of this argument is, that, on the theory of this bill, the party has lost his title to this surplus, and the vendee wrongly obtained the title. For that wrong the surveyor is sought to be held responsible and make good the loss. Why not hold that the purchaser, who has got that which he has not bought, shall make it good, and pay for what he has wrongly obtained? On the other theory, you give him land for which he does not pay, and make the surveyor pay for it, thus giving the vendee, who gets the benefit of the mistake, the land for nothing. Why should the surveyor pay for his lands? If the vendors had legally lost the land by his error, he ought to pay them, but certainly owes no duty to the purchaser.

The surveyor has been guilty of a culpable error, but the liability is precisely the same on his part, if he had made an erroneous survey for a private individual in his official capacity. He would only be liable to make good the loss occasioned by his error. But such party could only recover to the extent of his actual legal loss. So the parties here cannot say, we will submit to lose our land, but will make the surveyor, who can have no recourse on the purchaser, pay for it. The result is, the decree of

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the chancellor is modified so as to allow recovery of costs of survey as indicated in this opinion, costs of this court to be paid by complainant, and two-thirds of costs below up to this time.

Remand for account.

THE STATE for use, etc., v. W. E. BUTLER *et al.*

CONSTITUTIONAL LAW. *Equal taxes. Value at time tax imposed.* Constitution, article 2, section 28, requires all taxes to be equal and uniform throughout the State. This requires that all property be assessed at its value at the time the tax is imposed. The act of 1883, which gives the chancery court power to reduce taxes assessed in Memphis before the charter of that city was repealed, "when it shall appear that such assessments are excessive in view of the present value of said property," is unconstitutional.

FROM SHELBY.

Appeal from the Chancery Court at Memphis. W. W. McDOWELL, Ch.

W. M. RANDOLPH, MYERS & SNEED and M. MER-
RIWETHER for complainants.

FINLAY & PETERS, GANTT & PATTERSON, HARRIS
& TURLEY, METCALF & WALKER for Poston.

DEADERICK, C. J., delivered the opinion of the court.

Under the act of 1879, ch. 92, the receiver and

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back tax collector, therein provided for, filed this bill in the name of the State on behalf of all the creditors of the extinct corporation of Memphis, against all the delinquent tax-payers of said corporation, which had been theretofore revived as a "taxing district." The act provided that under this bill the taxes should be collected, that had accrued up to the time of the repeal of the charter, and that back taxes imposed prior to 1875 might be settled by the valid indebtedness of the municipality, as provided by the act of March 20, 1875, and if in any case the taxes were excessive, the chancery court was authorized to reduce the assessment so as to make it fair and just. The creditors were authorized to file their claims in said cause, and publication was ordered to make all creditors parties. If the claims were not contested the holder was entitled to payment *pro rata*.

Either the receiver and back tax collector or any creditor might contest any claim, and any party, dissatisfied with the decision of any litigated question, may have such question reheard in the Supreme Court, by appeal or writ of error, upon so much only of the record as pertains to that particular litigation.

By the act of March 27, 1883, the foregoing act was amended, and, amongst other things, it was provided that the chancery court may reduce assessments, made before repeal of the charter, when it appears that such assessments are excessive, in view of the present value of said property, and when the assessments, on said property for State or county purposes, have been or may be reduced by the county court of the county

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in which said property is situated. "Such reduction shall, if brought to the attention of the court by proper evidence, be *prima facie* sufficient for it to adopt and act upon the assessment as thus reduced in enforcing such taxes." Under this last named act, of March 27, 1883, the petitioners, D. H. and W. K. Poston, filed their petition in this case on April 12, 1883, praying the reduction of the taxes on two lots described. The taxes which it is sought to reduce were for the years 1862 to 1874 inclusive, and the annual assessments varied in amount from \$12,350 to \$23,700. No part of the taxes for those years was paid.

The petition alleges that the property was attached in 1859 or 1860, and was in litigation until 1870, and was neglected and almost vacant and abandoned and wholly unimproved, and that it was assessed greatly beyond its real value, and in 1875 and 1876 petitioners became the owners of the property and have since paid the taxes. They further allege that the lots were at no time worth more than \$7,500. They pray a reduction of the taxes, and aver that the county court has reduced the assessments on said lots, at its October term, 1882, for said years to \$9,500, and file as an exhibit to their petition a copy of the proceedings of the county court. The deposition of D. H. Poston was taken. He deposes that the property was then worth \$6,000 to \$8,000.

The chancellor reduced the assessment to \$9,500 on both lots, and certain creditors named, and the receiver and back tax collector, have appealed to this court.

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Appellants filed a bill of exceptions, which was signed by the chancellor, showing that they excepted to the reading as evidence of the copy of the order of the county court, and the deposition of said Poston, upon the ground that they were irrelevant and incompetent as evidence, but these exceptions were overruled. It also appears that the claims of the appellant creditors, had been duly filed and established in this cause.

Petitioners insist that under the act of 1883, passed 23d and approved 27th of March, the chancery court was authorized to reduce the assessments upon the property in question.

Our Constitution require all property to be taxed according to its value, that value to be ascertained in such manner as the Legislature may direct, so that taxes shall be equal and uniform throughout the State: Art. 2, sec. 28.

Undoubtedly these fundamental principles of taxation are intended to apply to the time at which such taxes are assessed, so that the property taxed shall be so taxed at this value at the time at which the tax is imposed; and also the equality and uniformity of taxation required, are equality and uniformity with taxes on property of like character imposed at or about the same time.

Nor do these requirements present any impediment to providing agencies to reduce assessments, which were, at the time they were imposed, excessive and unequal.

But it is not competent to the Legislature to prescribe a rule for the reduction of assessments, which

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will violate the manifest object of the fundamental law. That object is that the property must be taxed at its value, at the time the tax is imposed. A tax for 1866 must be for the value of the property in that year, not its value five years before or after. This may be widely different from its value in the year for which it is taxed.

The act of 1879, ch. 92, sec. 4, gives the chancery court power to reduce assessments, so as to make them fair and just, when it appears that the taxes imposed were excessive, that is, excessive when imposed. But the act of 1883 gives said court the power to reduce assessments, made before the charter of a municipal corporation was repealed, "when it shall appear to it that such assessments are excessive, in view of the present value of said property," etc. Thus making the value in 1866, when a tax was imposed, dependent upon and determinable by its value in 1883, or at such time as the court may undertake to correct the valuation of previous years. This reduction cannot be said to have been made upon the ground that the assessment was excessive or unequal at the time it was made, but that it was excessive in view of the present value of the property.

The petitioners seek to have the judgment of the chancellor corrected so as to charge the property for all the years before their purchase at its present value. They have sued out a writ of error, and the only fact proved by the deposition of D. H. Poston was that the present value of the property was \$6,000 to \$8,000, being less than the amount found by the

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chancellor. We are of opinion that the chancellor's decree was erroneous and must be reversed, and the petition dismissed with costs.

DEADERICK, C. J., upon motion to rehear, delivered the following opinion:

The petitioners, D. H. & W. K. Poston have presented a petition to rehear this cause in the matter of their petition to have the tax of Memphis city, upon certain lots described, reduced.

The argument is, that the reduction made by the county court to \$9,500 was made on the basis of the value at the time the assessment was made.

The reduction was made on this property to \$9,500 by the county court under the act of 1879, ch. 152, entitled an act to allow partial redemption of land sold for taxes, and for the relief of tax-payers.

It provides by sec. 1, that the quarterly courts, upon satisfactory reasons, by affidavit shown, may authorize the redemption of any part of a lot or tract of land heretofore sold to the Treasurer, for State and county taxes due thereon, etc.

And sec. 2 provides that the quarterly court is further authorized, for good reason shown by affidavit, to reduce the assessment and to remit interest and penalties on a lot or tract of land or portion thereof, which has been heretofore sold for State and county taxes to the Treasurer of the State, etc.

It was under this act that the county court reduced the value of the lots in question to the uniform value of \$9,500 for each of the years, from 1866 to 1874.

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The record, however, does not disclose that said lots had ever been sold for State and county taxes to the Treasurer of the State, which is one of the conditions upon which the county court had jurisdiction to reduce the assessments under said acts.

By the express provisions of the act of 1883, March 27, sec. 1, the chancery court shall have power to reduce assessments, when it shall appear to it that such assessments are excessive, *in view of the present value of the property*, and when it appears assessments have been reduced by the county court for State and county purposes, such reduction shall be *prima facie* sufficient for it (the chancery court) to adopt and act upon such assessment.

We do not understand this section as adopting two classes of cases, as argued: 1st. Those in which orders of reduction, were made by the county court; and 2d. Those in which the application is made in the first instance for reduction, to the chancery court.

If this were the true construction of the section, it necessarily contains two distinct and antagonistic bases of valuation. Indeed this is virtually admitted in the argument for rehearing. It is said that only in the application made in the first instance to the chancery court for reduction, can said court take into view the present value of the property. And in another part of the argument, it is said that the reduction to \$9,500 was adopted upon the action of the county court, and was the valuation at the time of the several assessments.

Thus the same section of this act is construed as

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authorizing the chancery court, where the county court reduction is not offered in evidence, to take into view the present value of the property; and where said county court reduction is offered in evidence, it is to be construed as evidence of the value of the series of years in which the assessments were made. The act of 1879 has reference only to the State and county taxes, the act of 1883 to taxes for municipal corporations.

We think the true construction of the act of 1883, sec. 1, is, that the chancery court may reduce assessments for previous years, when excessive, in view of the present value of the property, and that the valuation made by the county court in reduction by it, may be taken as *prima facie* evidence of its present value, for it is by this standard the act authorizes the chancery court to value the property, and it makes the action of the county court *prima facie* evidence of such value. So that the principle of present value, in reduction of value of former years, is the rule prescribed by that section, and the action of the county court is by the act made *prima facie* evidence on which the chancery court may act.

It is also objected that appellants have no right to raise the question passed upon, having no vested right in an assessment of taxes. We have decided at this term that these appellants and other creditors of their class have a right, under the act of 1879, to have their claims paid out of the fund arising from delinquent taxes, and are therefore interested in that fund, and, under sec. 10 of said act, when dissatisfied

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with the decision, in any litigated question, may have the same reheard in this court by appeal.

We are satisfied with the correctness of the opinion heretofore pronounced, and dismiss the petition for rehearing.

THE STATE v. WM. E. BUTLER *et al.*

1. MUNICIPAL CORPORATIONS. *Powers.* The city of Memphis, under the act of 1866, authorizing special assessments for construction of pavements, laid a special tax, which, after it was partly collected, was declared void; under the act of 1873, ch. 67, the city passed an ordinance directing the mayor to take up all receipts for payments of the void tax and issue certificates of indebtedness under the seal of the city instead thereof. The mayor took up a receipt wrongfully obtained by A from B, to whom it was payable, bearing no evidence of assignment, and issued a certificate of indebtedness to A, who sold it to a third party; the city, under a petition by B in a proceeding, instituted under the act of 1879, ch. 92, was ordered to issue another certificate of indebtedness to B.
2. VOID TAX. *Promise to repay.* A municipal corporation is under no legal obligation to repay amounts received under a void ordinance and statute, but the moral consideration will support a promise of repayment.
3. LIMITATIONS. *Pleadings.* The statute of limitations of six years must be specially pleaded.

FROM SHELBY.

Appeal from the Chancery Court at Memphis. W
W. McDOWELL, Ch.

State v. Butler.

W. M. RANDOLPH, MYERS & SREED and M. MER-
RIWETHER for complainants.

POSTON & POSTON and FINLAY & PETERS for
Greenlaw.

COOKE, Sp. J., delivered the opinion of the court.

In 1866 the Legislature passed an act by which it undertook to authorize the city of Memphis to make certain kinds of pavements upon certain streets in that city, and to assess and collect the cost of the same upon the property adjacent or abutting upon said streets.

In pursuance of this supposed authority, said city did contract for and cause to be constructed such pavements upon some of its streets, and assessed taxes to pay for the same upon the property of the citizens fronting upon or adjacent to such pavements, some of the owners of such property as was thus assessed, and among them the testator of petitioners, paid these assessments and took receipts therefor in accordance with the requirements of said city. These payments were made by W. B. Greenlaw, surviving partner of W. B. Greenlaw & Co., during the years 1867 and 1868, aggregating about the sum of \$10,000, and receipts taken therefor in his name as such surviving partner.

A large number of the property owners upon said streets thus paved, contested the right of the city to assess and collect taxes upon their property in this manner. And in 1872 the act of the Legislature, under which the authority was claimed, was held by this court to be unconstitutional and void: 9 Heis., 349.

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The contracts under which these pavements were constructed, however, have been held to be valid obligations of the city to be paid by a general assessment upon all the assessable property within the city.

Soon after this decision, by an act of the Legislature passed March 24, 1873, entitled an act to amend the charters of all the incorporated towns and cities in the State, it was provided that where any incorporated town or city has, by virtue of presumed authority to lay special assessments for specific purposes, levied and collected taxes, or special assessments, the right to make which levy and assessment was afterwards declared void by the Supreme Court of the State, said town or city shall have the power to levy a tax, in addition to all other taxes allowed by law to be levied, sufficient to cover the entire cost of the improvement, with interest thereon, for which said special assessments were illegally made, and in the levying such additional tax, authority is hereby given to such town or city, to allow as valid payments on said additional tax any sum or sums, with interest, paid by persons in satisfaction, or in part satisfaction, of said special assessments illegally levied and collected as aforesaid: Acts 1873, ch. 67, page 102.

In pursuance of the authority conferred by this act, the city of Memphis, on June 25, 1873, passed an ordinance which contained the following provisions: "The mayor is hereby authorized and required to issue to each and every firm or corporation holding the receipts of the contractors or of the city, for the payments actually made upon bills or accounts certified

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to be correct by the city engineer for account of the paving of the streets and alleys of the city, with the Nicholson or stone paving under the provisions of the city charter or ordinances of the city, charging the costs of such payments upon the property in front of which the pavement was laid down, which provisions of the charter or ordinances have been held by the Supreme Court of Tennessee to be unconstitutional and void; a certificate of indebtedness under the seal of the city and countersigned by the register for the amount of money actually paid upon such receipts with interest thereon at the rate of six per cent from the date of payment until the time said certificate may be redeemed by the city. And upon issuing the certificate of indebtedness, the mayor shall take up the receipt on account of which the certificate is issued, and shall cause it to be cancelled and filed as a voucher, in the office of the Comptroller." It was also further provided that such certificates should be received at their face value in payment of the tax levied to pay the costs of the paving.

The property upon which these payments in question of illegal taxes were made, was partnership property belonging to the firm of W. B. Greenlaw & Co., which was composed of W. B. Greenlaw and J. O. Greenlaw. J. O. Greenlaw had died in 1864, and these taxes were paid by W. B. Greenlaw as surviving partner of said firm of W. B. Greenlaw & Co., and the receipts taken in his name as such surviving partner of said firm. Said J. O. Greenlaw died testate, his will was proven and recorded in Shelby county,

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and the surviving partner, W. B. Greenlaw, was also appointed and qualified as his sole executor. In 1868 said W. B. Greenlaw, as such executor and surviving partner, filed a bill in the chancery court at Memphis, to settle the copartnership of W. B. Greenlaw & Co. An account was ordered in said cause, which was taken on the 17th of February, 1869. Upon the taking of said account, W. B. Greenlaw produced said receipts before the commissioner by whom said account was taken, as evidence of payments made by him on account of the partnership, who allowed the same to him as credits, and referred to said receipts in his report as vouchers, and deposited the same (as the agreed state of facts shows), along with said report on said 17th of February, 1869, but said receipts had no endorsement put upon them showing they had been filed in said suit.

On the 21st day of July, 1873, one William B. Greenlaw, Jr., who was the son of J. O. Greenlaw, deceased, and nephew of W. B. Greenlaw, the surviving partner of said firm of W. B. Greenlaw & Co., produced to the mayor in his office, the said original receipts and demanded the issuance of certificates of indebtedness thereon as provided by said city ordinance, and the mayor thereupon issued certificates of indebtedness of the city therefor to William B. Greenlaw, Jr., or order, who surrendered said receipts to the mayor, and they were cancelled and filed in the mayor's office.

The father of said William B. Greenlaw, Jr., had then been dead for many years, and his will had been

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admitted to probate and registered in Shelby county, by the terms of which said William B. Greenlaw, Jr., had no interest whatever in his estate. The officers of said city of Memphis, when they received said receipts and issued said certificates of indebtedness, had no notice, except such as said receipts themselves gave them, that the receipts did not belong to said William B. Greenlaw, Jr., or that he was receiving them without right, or that he had been guilty of or was contemplating any breach of duty or good faith with reference to the said receipts or the money they entitled the owners thereof to, or the said certificates. It is not shown by what means said William B. Greenlaw, Jr., obtained said receipts, but the inference is very manifest that he fraudulently abstracted them from the clerk and master's office where they had been deposited. He sold or disposed of said certificates of indebtedness so issued to him and the city has either paid them or is liable for them in the hands of innocent holders. He was and is totally insolvent.

William B. Greenlaw, the surviving partner of Wm. B. Greenlaw & Co., and executor of J. O. Greenlaw, deceased, died in 1875 testate, and W. E. Greenlaw was duly appointed and qualified as his executor and D. H. Poston was appointed administrator *de bonis non*, with the will annexed of J. O. Greenlaw, deceased.

On the 7th of January, 1878, they as such executor and administrator *de bonis non*, having demanded of the mayor of the city of Memphis, the issuance to them of certificates of indebtedness as such repre-

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sentatives of said J. O. and W. B. Greenlaw, deceased, upon said receipts, and having been refused, filed a petition for *mandamus* in the circuit court of Shelby county, against said city of Memphis and the mayor thereof, seeking to compel the issuance of the same to them under the provisions of said ordinance.

Pending this proceeding, the Legislature in 1879 repealed the charter of the city of Memphis, and established what is termed the Taxing District of Memphis, by which action a different organization was established and the office of mayor of said city abolished.

The corporation of the city of Memphis was abolished by the Legislature January 31, 1879. The bill under which the Taxing District was established was passed the same day, and on the 14th of March, 1879, an act was passed for the purpose, among other things, to collect and dispose of the taxes and make settlement of the debts of corporations whose charters had been repealed. By the 4th section of said act, the receiver and back-tax collector was authorized to file a general creditor's bill in the name of the State, in behalf of all creditors against all delinquent tax-payers, etc. All pending suits were to be revived in the name of the State and consolidated with the general proceedings therein provided for, and when so consolidated to form part of said general proceeding. It is further provided that the court in which said proceeding may be instituted, shall have power to settle and adjust all equities, * * * and to give all relief, both to defendants and the creditors that might be given, if there were as many separate suits as there are creditors and delin-

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quent tax-payers. The chancery court, in the exercise of the jurisdiction conferred by this act, shall have all the powers possessed by such courts, in the administration of the estates of insolvent natural or corporate persons: Acts of 1879, ch. 92, sec. 4.

By section 10 of said act it is further provided that publication shall make all creditors parties, with the right to relief as fully as if especially named, * * and that if any creditor, or the receiver and back tax collector, shall desire to contest the validity, in whole or in part, of any claim filed in common form, he may do so in a summary way in the progress of the cause, and the opposing parties in such contest shall reduce the facts to writing that are necessary to its determination, and file the same, and, when filed, they shall become part of the record, etc.; and when either party is dissatisfied with the decision of any litigated question, he may have such question re-heard upon appeal, etc.

The bill provided for by this act was soon thereafter filed in the chancery court at Memphis, by the style of the State v. W. E. Butler *et al.*, where it is still pending. On the 9th day of July, 1881, the complainants in this proceeding filed their petition in said cause against the city of Memphis, or Taxing District, by which they fully and *in extenso* alleged all the above recited facts, and averred that by reason of the procurement by the city of Memphis of the repeal of its charter, and abolition of the office of mayor and change in the local government of said district, the remedy sought by their said suit

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by *mandamus* proceedings had been rendered and become inappropriate and impossible as a mode of relief adapted to their case, and that a court of equity could alone afford them adequate relief, and praying for such appropriate relief as their case entitles them to.

An agreed state of facts was made up by the parties, and filed in the record, but no answer or other defense to said petition appears to have been made in writing or filed in the case.

Upon the hearing of the matters of said petition, the chancellor was of opinion that the petitioners' claim was barred by the statute of limitations, and dismissed the petition, and complainants have appealed.

For the defense it is now insisted that the mayor of the city of Memphis was authorized to issue the certificates of indebtedness to Wm. B. Greenlaw, Jr., upon the presentation by him of said receipts, and demand for the issuance of the same, he having the receipts in his possession, and the city authorities having no notice of any fraud on his part in regard to them, except such as they could derive from the face of the receipts.

It is a sufficient answer to this to say that the ordinance above cited authorized the issuance of the certificates of indebtedness to the holder of the receipts, upon their presentation, etc. The record leaves no doubt but that William B. Greenlaw, Jr., surreptitiously obtained the receipts from the office of the clerk and master, and that he was neither the

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legal owner or holder of the same. The receipts upon their face showed that they were executed to W. B. Greenlaw, surviving partner of W. B. Greenlaw & Co.; they contained no evidences of any transfer by the original holder; they were not negotiable; and the fact that they were presented by a wholly different person, without any show of right or authority, except the possession of them, was a circumstance sufficient to put the mayor and city authorities upon inquiry as to his right to demand the issuance of said certificates of indebtedness in his own name, and the issuing of them to him was unauthorized.

But it insisted that if this be so, it was an unauthorized act on the part of the mayor, for which the city could not be held responsible. This cannot be maintained for two reasons—first, because it was made his duty by the city ordinance to take up the receipts and issue certificates of indebtedness for them; and his negligence in issuing them to the party not entitled to them was a wrongful act within the scope of his authority for which the city is liable; and second, because the wrongful issuance of certificates of indebtedness upon said receipts, and the unauthorized cancellation of them did not divest the true owner and holder of this right to have certificates of indebtedness issued to themselves upon them, notwithstanding the previous illegal issuance of others to William B. Greenlaw, Jr.. The receipts, then, being wrongfully in the possession of the city, it was the duty of the mayor and city authorities to issue

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certificates of indebtedness upon said receipts to the complainants upon their demand, and his wrongfully refusing to do so gave the complainants a right to compel their issuance by *mandamus*.

It is again insisted for the defense, that, as no right of action against the city accrued by reason of the payment in the first instance of said illegally assessed taxes, hence there can be no right of recovery now existing for the same. Notwithstanding the voluntary payment of taxes illegally assessed does not constitute or confer a right of action to recover them back, yet it did create a moral obligation on the part of the city to repay them, and was a sufficient consideration to support a subsequent promise to do so. And this promise was made by the ordinance of the 25th of June, 1873, and the city became bound by this recognition and promise to pay this indebtedness evidenced by these receipts, as was decided by this court in the case of *Lea v. City of Memphis*, 9 Baxt., 109.

The defense mainly relied upon, however, is the statute of limitations, as this was the ground upon which the chancellor based his decree dismissing the petition. The statute of limitations, to be available, must be pleaded: *Merriman v. Cannovan*, 9 Baxt., 97; 1 Heis., 701; 10 Yer., 119; and it would, perhaps, be sufficient to say that in this case the statute is not pleaded, nor in any manner relied upon, either by answer, plea or exceptions, and could not be assigned as a defense merely by way of argument, no particular statute being anywhere pointed out or re-

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lied upon in the record as a defense. But if this were not so, the suit by *mandamus*, which at the time was an adequate and appropriate mode of redress, was instituted within six years next after the passage of the ordinance by which the city recognized and promised to pay this indebtedness, as above shown, and the defendant by its own action, changed its organization in such manner as to render the mode of redress which had been resorted to inappropriate and unavailing to the petitioners, and in such a case the inherent powers of a court of equity would authorize it to afford relief. Besides, this was not an abandonment of the suit at law, but the invocation of the aid of a court of equity to afford appropriate relief, which, by the act of the defendant, had been rendered impossible in the suit which had been instituted, and was not an abandonment of the litigation, but a continuance of it, as above stated, by resorting to the only mode by which it could then be made available. Besides, by the legislation above referred to, all creditors were required to file their claims in the general suit for settling the affairs of the city, to be litigated under the general proceeding in that case. And the terms of said act itself was a transfer of the litigation in that suit to the general creditors' bill provided for and instituted under it, and in accordance with which this petition was filed in said cause. Under the facts of this case the statute of limitations, if pleaded, could not constitute a defense in a court of equity.

The chancellor's decree dismissing the petition was

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therefore erroneous, and will be reversed, and a decree entered in favor of the petitioners for the amount of the taxes paid as shown by the face of said receipts, with interest from the date of the same, which will be paid in the same manner as other holders of like receipts have been or are entitled to be paid, out of the funds set apart for that purpose.

E. J. READ v. N. PATTERSON.

1. PRACTICE. *Depositions. Questions omitted.* Code, section 3859, declaring that the commissioner should require the questions to be reduced to writing, etc., is directory. It is advisable to insert the questions, as they often aid in the interpretation of the answers; but it is not essential to its admissibility that a deposition should be thus taken.
2. SAME. *Same. On whose behalf.* Where the deposition fails to show on whose behalf the deponent is a witness, it suffices if this fact appears from the notice.
3. SAME. *Same. Signature of witness.* Regularly a deponent should sign at the end of the deposition, but a deposition is not inadmissible because the deponent signed at the end of the commissioner's certificate.
4. SAME. *Same. Official character of commissioner.* It is sufficient if the official character of the commissioner appears from his signature at the end, though not stated in the body, of the certificate.
5. SAME. *Same. Postponement.* Where the notice is to take the deposition on a certain day, the officer cannot postpone to another day; but if the notice be to take on a day certain, and the deposition is then commenced, and it becomes impracticable to finish it that day, it may be finished the next.

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6. ATTORNEY AND CLIENT. *Contributory negligence of client.* Where an attorney negligently fails, in violation of express instructions from his client, to issue execution upon a judgment, he is liable in any event for nominal damages, and if the judgment could have been collected by execution, and is afterwards lost through the insolvency of the debtor, he is liable for the full amount of the judgment; but if the client discharges the negligent attorney, and the judgment could then have been collected by execution, which the client negligently fails to have issued, and the debtors afterward become insolvent, the attorney is liable only for nominal damages, the negligence of the client being the proximate cause of the loss.

FROM HAYWOOD.

Appeal in error from the Circuit Court of Haywood county. J. T. CARTEL, J.

A. D. BRIGHT for Read.

W. A. ALLEN & SON for Patterson.

DEADERICK, C. J., delivered the opinion of the court.

In 1860 Patterson placed in the hands of Read three notes aggregating \$1,200 or \$1,300 on Klyce & R. G. Cates, for collection. Read obtained a judgment on each note. The judgments were stayed 8th of August, 1860, having been obtained before a justice of the peace. In April, 1861, executions were issued on said judgments and severally returned "not satisfied." In April, 1866, an *alias* execution was issued upon each of said judgments, neither of which was returned up to the bringing of this suit in March, 1871, in the circuit court of Haywood county.

The declaration contains two counts, one for money had and received for the use of the plaintiff; the

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other for failure to collect and pay over the debts above named.

The defendant pleaded *nil debit*, payment, *non assumpsit*, set-off and the statute of limitations of three and six years.

The verdict and judgment were in favor of the plaintiff for the whole amount of said judgments remaining unpaid, and the defendant has appealed in error to this court.

Defendant below took exceptions to the reading of the deposition of plaintiff, taken 19th and 20th of February, 1880, and filed seven specific exceptions.

The first, second and third exceptions are that the deposition is given without setting out in writing in the depositions the questions propounded to the witness, as prescribed by section 3859 of the Code. That section declares that the commissioner should require the questions to be reduced to writing and read over to the witness, etc. But it does not mean that a deposition not taken in this manner shall not be read. It is directory and is perhaps ordinarily the better mode of attaining an intelligible recital of the facts from the witness, as the question may often aid in the interpretation of the answer. But it is not essential to its admissibility that a deposition should be thus taken. It is the answer of the witness, and not the question that is reduced to writing, and what he says pertinent to the issues, whether elicited by verbal or written questions, constitutes his deposition. These exceptions were, therefore, properly overruled.

The third exception is because the caption is not

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in accord with section 3848 of our Code, in this, that it does not show whether the witness was called for plaintiff or defendant, nor does it show his age, nor is it signed by the witness.

The notice is filed, pursuant to which the deposition was taken and shows that the plaintiff was to be examined in his own behalf. If this be material, it does sufficiently appear, and the age of the witness (seventy years), also appears. The witness also signs, but not at the usual place, at the end of the deposition, but at the end of the certificate of the justice and above his attestation. This is a sufficient signing of the deposition.

The fifth and sixth are exceptions of the character last named exception, and are untenable. The seventh and last exception is because the official character of the justice taking the deposition is not shown in the caption or certificate. The form in the Code, section 3848, does not contain any recital in the caption or certificate of the official character of the officer taking the deposition. It is sufficient if that fact fully appears in the signature of the officer as it does in this case at the end of his certificate.

There is, therefore, nothing in the exceptions taken, and they were all properly overruled by the judge, upon appeal from the action of the clerk.

A deposition of plaintiff below had been previously taken, and also the deposition of Lynd, his clerk, was taken at the same time. Notice was given to take these depositions on the 19th of March, 1872.

The depositions were voluminous and were not con-

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cluded on the 19th day of March, but the commissioner, for this reason, adjourned until the next day at 9 o'clock, and then met at the same place. The witness Patterson, whose deposition was unfinished, concluded his deposition with one additional sentence of no great consequence.

It is true that it has been held that where the notice is to take the deposition on a certain day, the officer cannot postpone to another day: 11 Heis., 446. But if the notice be to take on a day certain and the deposition is then commenced, and it becomes impracticable to finish it that day, it may be finished the next. The defendant did not attend, and if he had applied the court might properly have allowed him to cross-examine. But the deposition ought not to have been rejected, and there was no error in the refusal of the court to reject it. But there seems to have been no action of the court invoked, upon defendant's appeal from the clerk's action in overruling the exceptions to the depositions.

We hold, therefore, that these depositions were properly admitted as evidence to go to the jury.

The record discloses that defendant is a practicing lawyer in Haywood county, and plaintiff a merchant in Cincinnati; that the plaintiff, in 1860, put in defendant's hands three notes of about \$460 each on Klyce & Cates for collection; that judgments were obtained on said notes in said county, where the debtors resided, and in due time executions were issued thereon 9th of April, 1861, soon after the expiration of the stay. These executions were returned "not satisfied,"

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20th of April, 1861, and *alias* executions were issued the same day and were never returned. A payment of \$176 was made to defendant in a mule and other things, which he retained, on account of indebtedness to him by plaintiff for other professional services. No other payment was ever made except \$700, which defendant remitted to plaintiff in July, 1867.

In the meantime the debtors were perfectly solvent, or at least one of them, Cates, and he remained good for the whole amount due until the 22d of May, 1879, when he transferred or sold his property, and thereafter nothing could be made off him by execution at law.

In December, 1868, plaintiff becoming dissatisfied with the delay in the collection of the judgments, ordered defendant "to turn the papers over to Mr. W. A. Allen," an attorney who was attending to other business for him. This, plaintiff and Allen state, he refused to do; and Allen states that he refused when he applied to him "to turn them over," until his fees were paid, and claimed a lien on the judgments for his fees. Afterwards plaintiff called at defendant's office in Brownsville, and the son and partner of defendant, as plaintiff states, promised if the matter was left with them, he would see that the judgments were collected.

In 1870, plaintiff states, the money not having been collected, and having been informed the claims were good, he instructed Mr. Allen, by letter, to call on Read, and if he did not settle to take the necessary steps "to force the matter to a finality," and to show Read the letter. Allen proves that he called on Read

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and showed him plaintiff's letter, and he refused to give up the claims unless his fees were paid, and refused to make out his bill so that witness might send it to plaintiff.

Allen also states he had no control of the claims until in May, 1879, too late to have executions issued before sale of his property by Cates. But he knew the judgments were on the justices (Johnson's) docket since about the year 1869. This suit was brought by instructions of plaintiff, on March 14, 1871.

We do not see why defendant did not have the money made upon these judgments as he was repeatedly instructed to do. Nor can we conceive why the plaintiff himself or his subsequently employed counsel, did not resort to the simple and effective method of having executions issued upon the judgments of the justice of the peace. There were no papers in the hands of defendant to be obtained by plaintiff before resorting to this remedy. The officer to whom the executions might have been issued, could have levied it upon Cates' property, which was in Haywood county, and the evidence is full that he had more than enough to satisfy the debts, and there is no evidence to the contrary.

His Honor charged the jury, that for the omission to use ordinary diligence to collect the money, if no actual damage accrued, defendant would still be liable for nominal damages, but if actual loss or damage is shown he would be liable for the same.

His Honor also instructed the jury as follows: "If the makers of said notes, or the defendants, in the

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judgments based on them, were good, and the defendant failed to collect them for the want of the exercise of ordinary diligence and said parties failed, and the money could not afterwards be collected, defendant would be liable to the plaintiff for any actual loss that resulted from a failure to exercise ordinary diligence." Further he says: "Defendant would only be liable for damages or loss that may have resulted during the time the claims were in his charge, or under his control as an attorney. If the plaintiff took the collection of said claims out of the hands of defendant and placed them in the hands of W. A. Allen as his agent and attorney, when the claims were good and might have been collected by Allen, then the defendant would not be liable for any actual loss or damage at all." "If you find that said claims were in judgments before a justice of the peace, and the plaintiff or W. A. Allen knew where they were, then plaintiff, or Allen as his agent, had the right to take control of the judgments, and further turning over of the claims by defendant was not necessary, when he was discharged by plaintiff as his attorney, if he was so discharged, and in such event defendant would not be liable for any actual loss that accrued afterwards."

These instructions are, we think, correct, and fairly present the theories upon which plaintiff would, or would not be entitled to recover.

We may assume, as a consequence of the institution of this suit, that defendant was then, if not before, repudiated as plaintiff's attorney. It is certain that his attorney, Allen, had knowledge as early as 1869

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of the fact that the judgments remained unpaid, upon Johnson's docket.

Plaintiff had knowledge of the same facts as early as February, 1872, when he refers to them in his deposition of that date, and they are exhibited with the deposition of his book-keeper of same date. In fact, it is highly probable he knew all these facts at a much earlier period, although it does not distinctly so appear from the record.

Cates was perfectly solvent during all this time, and so remained up to the 22d of May, 1879. So the judgments could have been collected after the discharge of defendant as attorney, and after plaintiff knew where they were and all about them, and that they were unsatisfied. Such are the uncontradicted facts in this case, and there is no evidence in the record to support the finding of the jury against defendant for the whole amount of the balance due on said judgments. He was guilty of negligence for not collecting the money when he could have done it. But this negligence was not the proximate or natural occasion of the loss, for after this plaintiff himself might have collected the money.

The plaintiff ought to have taken steps to collect his judgments, after he had repudiated defendant as his attorney. There was nothing to hinder him from ordinary execution at any time, and although he may have a right to recover nominal damages for negligence of defendant, he has no right, by act or omission, so to conduct himself as to accumulate damages against defendant: Sedg. on Dam., 6th ed., 250.

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The declaration as stated contains two counts, one for money had and received; the other, for failure to collect and pay over as he contracted, etc. It does not aver that the debts were lost by the defendant's failure, as in fact they were not, and upon this declaration he could only recover for money had and received, such damages as had accrued up to the time of suit brought for failure to collect, and not the whole amount of the judgments, as it is neither averred nor proved that they were lost by such neglect. On the contrary, the uncontradicted evidence in the record is that the debts could have been collected on said judgments at the very time this suit was begun, and for years before, and afterwards.

We are of opinion, therefore, that there is no evidence to support the finding of the jury against defendant, for the amount of the judgments. His Honor should have granted a new trial, and the judgment will be reversed.

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PARKER CAMPBELL v. THOMAS HAMPTON *et al.*

1. PLEADING. *Ejectment. Third person only admitted to contest merits.* In an action of ejectment, after issue joined on pleas of not guilty, a third person admitted, on his own application, as a party defendant, cannot plead in abatement that the original defendants were not served with copy of declaration; he can only plead to the merits.
2. LOCAL ACTION. *Land lying partly in two counties. Attachment. Jurisdiction.* By section 2810 of the Code (act of 1847-8, ch. 173), it was intended that where a tract of land lies in two counties, all of which is subject to the same claim or demand by a party, he might enforce that demand against the whole by suit begun in either of the counties in which part of the tract lies; and in such case the right to the whole would be passed, although part of it was in a different county from that in which the suit was pending.
3. SUPREME COURT PRACTICE. *Reversal. Verdict against evidence.* The Supreme Court will not grant a new trial on a mere preponderance of evidence against the verdict.
4. LANDLORD AND TENANT. *Estoppel.* A tenant is estopped to deny his landlord's title.

FROM CROCKETT.

Appeal in error from the Circuit Court of Crockett county. J. T. CARTHEL, J.

C. C. MOSS for Campbell.

S. R. LATTA, T. E. RICHARDSON, MCFARLAND and BRIGGS for Hampton.

DEADERICK, C. J., delivered the opinion of the court.

This action of ejectment was instituted in the

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circuit court of Crockett county, to recover a tract of land, lying partly in said county of Crockett and partly in Dyer county.

The suit was begun October 5, 1878, against Thomas Hampton and Robert C. Coffman, and Ann E. Screws, W. C. Howell and D. B. Dodson were afterwards made defendants, and all of them filed pleas of not guilty.

Howell and Dodson also filed a disclaimer to all the land sued for, except a part thereof lying between two lines, claimed respectively by the parties as being the east boundary line of Ben. Smith's grant, and more particularly described in the pleadings.

At May term, 1881, Charles R. Railey, upon his own application, was admitted as a defendant in said cause, he claiming said land in fee simple.

Verdict and judgment were for plaintiff for the land sued for, except twelve acres described in the verdict, and about 101 acres lying upon the east side of the tract, and west of the line claimed by plaintiff as the eastern boundary of the Ben. Smith grant No. 416, and east of the line claimed by the defendants as the eastern boundary of said grant No. 416. The jury found that the land between these two lines was not included in the title papers of plaintiff, and their verdict to this extent was for defendants. From the judgment, in favor of defendants for said 101 acres of land, plaintiffs appealed. And from the judgment in favor of plaintiff, defendant Railey appealed.

As soon as Railey was allowed to defend, he offered to file a plea in abatement, averring that neither he

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nor his co-defendants had been served with a copy of the declaration.

The court refused to allow said plea to be filed. This was obviously correct. The other defendants had long before filed their plea of not guilty, and if they had not been served with copy of declaration, the omission was waived and cured by their failure to except or plead it, much less could the recently admitted defendant put in such plea for them.

No summons was served on Railey, but he was made a defendant on his own application at the trial term, and, under such circumstances, it was not necessary that he should be served with a copy of the declaration, which the statute provides shall be left with him, when he is brought into court by service of summons. He was required to plead to the merits, which he did by putting in the plea of not guilty, upon which issue was taken.

The record shows that the said Parker Campbell had procured original and counterpart attachments to issue from the circuit court of Dyer county, which were levied on the said land, that part in Dyer being levied on by the sheriff of Dyer, and that part of said tract lying in Crockett was levied on by the sheriff of Crockett county. The land was attached as the property of defendant Railey, and Campbell obtained, upon this proceeding, a judgment against Railey for about \$4,500, and a *venditioni exponas* was issued by order of the circuit court to the sheriff of Dyer county, commanding him to sell the whole tract for the satisfaction of the said judgment. It was duly

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sold by said sheriff, at the door of the court house in Dyer county, and Campbell became the purchaser, took a deed from the sheriff, and began this suit in Crockett county circuit court to recover the land.

. The plaintiff in deraigning his title to the land, introduced a grant No. 416, to Ben. Smith, with other grants and mesne conveyances down to a deed to Railey conveying 640 acres in northeast corner of the said Ben. Smith grant, less twelve acres conceded to be held under a superior title, by virtue of the statute of limitations. He also introduced the proceedings in his attachment case against Railey and the sheriff's deed to himself.

The first question presented and chiefly argued, is upon the validity of the sale by the sheriff of Dyer county of that part of the tract of land lying in Crockett county, and the sufficiency of his deed to convey title thereto.

We do not understand that any objection is taken to any part of the proceedings in the attachment suit, had in the circuit court of Dyer county, up to the time that the court directed the Sheriff of Dyer county to sell the tract of land, as well that part lying in Crockett county as that part lying in Dyer county.

But defendants do insist that the sheriff of Dyer county had no power to sell land in Crockett county, and that the order of the circuit court could communicate no such authority; that the sale of the Crockett county land was void, and that no suit could be maintained in Crockett county to recover the land upon such void sale, nor to recover land lying in Dyer county.

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Chapter 4, of the Code, treats "of the place of bringing civil actions." Section 2810, of that chapter, provides: "In actions commenced by the attachment of property, without personal service of process, and in cases where the suit is brought to obtain possession of personal property, or to enforce a lien or mortgage, or where it relates to real property, the attachment may be sued out or suit brought in any county where the real property or any portion of it lies, or where any part of the personal property may be found." To this section, at the bottom, is appended the words, "act of 1847-8, ch. 173, extended."

Turning to the act of 1847-8 ch. 173, we find it entitled "an act to enable the circuit courts to do justice in certain cases," and it provides "that in all actions of ejectment, or trespass for injuries to real estate, where the tract of land lies in two or more counties, the court of the county in which process shall be served on the defendant or defendants, shall have jurisdiction to try the title to the whole tract of land, in the action of ejectment, and award execution accordingly; and in the action of trespass to hear and determine the case, as though the entire tract lay in the county in which the suit was brought."

This act gave full power to try a cause for the whole tract of land lying in two or more counties, to the court of either county in which process was served on defendant, and to execute the judgment.

Sec. 2810, of the Code, purports to be an extension of the act of 1847-8, and we think was intended to so operate in the cases specified so as to include the

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two classes of cases, ejectment and trespass to realty. It does not so declare in distinct terms, but we are of opinion that the fair construction of the language sustains this conclusion.

This section gives the jurisdiction, where it is sought to recover possession of personal property, or enforce a mortgage or lien, or where the suit relates to real property, to the court of the county where any part of the realty lies or any of the personal property is found.

The jurisdiction is not limited to the part of the realty or personalty found in the county, but extends to the property about which the suit is brought, or attachment sued out. To so restrict the application of this section, would be to make it but a re-enactment of other familiar statutes and well established common law principles. We think it was intended, that where a tract of land, for example, lies in two counties, all of which was subject to the same claim or demand by a party, he might enforce that demand against the whole, by suit begun in one of the counties in which part of the tract lies. A fair transposition of part of this section, which is in harmony with the whole of it, is "a suit which relates to real property; may be brought in any county where any portion of said real property lies." And in such a suit the right to the whole would be passed upon although part of it was in a different county from that in which the suit was pending. Such, we think, is the intention of the statute.

The extension of the act of 1847-8 indicated, con-

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sists in the application of its provisions to cases commenced by attachment, and to suits brought to obtain possession of personal property, to enforce a lien or mortgage, as well as to all cases relating to real property, as provided in sec. 2810 of the Code.

This being so, we hold that the circuit court in Dyer county had jurisdiction to order the sale of the whole tract by the sheriff of that county, so as to make his jurisdiction effectual in the disposition of the land and the application of its proceeds to the satisfaction of plaintiff's claim. The sheriff, having the right to sell, might convey the title to the purchaser.

This view derives further support from sec. 3536 of the Code, under the head of "mode of procedure in attachment cases." That section declares that property attached, if not replevied, will be subjected to the satisfaction of the judgment or decrees, by sale on such terms, in the discretion of the court, as may be deemed for the interest of the parties, by order of sale or by other process necessary to effect the object.

It was manifestly for the interest of the parties that the land should be sold as a whole, as it was nearly a square, and the county line divided it irregularly and unequally into two triangles.

We are of opinion, therefore, that the sale by the sheriff of Dyer county was not void, and that the circuit court of the county of Crockett had jurisdiction to try this case, involving the title to the whole tract of land. Cases have been cited by defendant's counsel holding a different view, but we rest our decision in this case upon our own statutes, enacted for

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the purpose of conferring jurisdiction, in cases like this, upon our courts, so as to avoid multiplicity of suits.

Nothing appears in the record entitling Railey to a reversal of the judgment. As before indicated, his title has been divested and vested in plaintiff.

Although we are of opinion that the weight of the evidence is against the finding of the jury, as to the true eastern boundary of the grant 416, yet there certainly is evidence sufficient to support the verdict, and under our well settled rule upon this question we cannot disturb the verdict, although the circuit judge might well have done so.

None of defendants have shown any title in themselves; some of them were tenants of Railey while he owned the land; others subsequently became tenants of plaintiff, but there is some evidence to show that before this suit began they disclaimed their landlord's title and gave him notice, and took and held possession of part of the land between the two contested eastern boundary lines in hostility to the plaintiff's title. But being in possession they were allowed to show an outstanding title in third parties, and thus in part to defeat the plaintiff's claim.

We do not think there is any reversible error in the record, and affirm the judgment. The costs of this court shall be paid one-half by plaintiffs and the other by defendant Railey.

Upon petition to rehear, DEADERICK, C. J., said:

Upon a former day of the present term of this court, an opinion was delivered affirming the judg-

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ment of the circuit court of Crockett county in this cause.

The judgment below was in favor of plaintiff, Campbell, for all the land sued for except 101 acres, east of what was found by the jury to be the true eastern boundary of Ben. Smith's grant, No. 416, and 12 acres described in the verdict.

Plaintiff has filed a petition for a rehearing of the case, and we have re-examined the record, and in so far as the questions and argument made in respect to the 101 acres are concerned, we have carefully reconsidered the evidence, and feel constrained to come to a different conclusion from that first arrived at.

In our former opinion we announced that while we were of opinion that the weight of the evidence was against the finding of the jury as to the true eastern boundary of grant No. 416, yet there was sufficient evidence to sustain the verdict of the jury, and that we would not disturb it. This opinion was reached upon the testimony of Latta, Dodson, Howell, and Griffin. Latta stated that he had rented the land in controversy, as agent of defendant Railey, to Dodson and Howell, but that since 1875 they had not rented from him, and claimed the land as their own, when this suit was commenced, and that they set up claim to the land they are on all the time. The land they were on was part of the 101 acres.

Dodson testified that in October, 1867, he married one of the daughters of W. H. Craig, and settled on land of said Craig near the disputed land; that he cleared some of the disputed land in 1868, and

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claimed it as his own, and that he bought of Hubbard in 1876, who claimed under a tax sale, and then claimed under that tax sale. Howell testifies that in October, 1867, he also married a daughter of said W. H. Craig, and took possession of part of his land near the disputed land, and in 1868 enclosed part of it, and had always claimed the land as his own. Griffin testified to facts tending to show that the western of the two lines claimed respectively by plaintiff and defendants as the true line, was the eastern boundary of grant No. 416 to Ben. Smith.

Upon these facts, we held that defendants, Dodson and Howell, having shown they claimed for themselves, and there being some evidence to support the verdict in favor of the more western of the two lines claimed as the east boundary of grant No. 416, that the verdict was supported by evidence. But a more careful analysis of the evidence satisfies us that there is no sufficient evidence to support the verdict.

Dodson and Howell, who both rented from plaintiff the land they claim, now urge that they were induced by the misrepresentation of Moss, agent for plaintiff, to acknowledge plaintiff's right to the land.

But, although the judge charged the jury, if Moss did deceive or misrepresent the facts to them, they would not be estopped by said renting, there is no evidence of any fact in their own testimony, nor in any other, to sustain such an imputation, nor to relieve them of the consequences of having attorned to plaintiff after his purchase of the land under his judgment against Railey.

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Wm. H. Craig had entered the land in dispute, and Dodson and Howell were holding and claiming part of it under him, and were on the land when Railey recovered it. They had no paper title thereto, but took possession, as they stated, under a promise by Craig to make them a deed of gift to part of said land. But after Railey had recovered the land of Craig and others in 1871, by decree of this court, Dodson and Howell rented of Railey for the years 1872-3-4, and after this, about 1875, plaintiff having bought the land at his execution sale, they attorned to him, and rented of his agent.

They do not, upon the facts they state, claim any other title to the land than that which they derive from being put in possession by Craig. His title was declared void, and the title was vested in Railey. Thereupon they rented of Railey, and when plaintiff acquired his title they rented of him, and again rented of Railey. And, as a defense to this suit, Railey sets up his original title, and Dodson and Howell claim adversely to both.

Dodson and Howell admit they had no title from their father-in-law, and that they went into possession under a promise from him to make them a title. When, however, in 1871, in Railey's suit against Craig and others, it was held Railey had the better title, and a writ of possession was awarded him, Dodson and Howell attorned to Railey and became his tenants, with full knowledge of all the facts; and when Campbell acquired Railey's title they became his tenants, but subsequently agreed again to rent of

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Railey; and after this rented of a purchaser at a tax sale, and when Campbell acquired this tax title by redemption, they say they set up a claim for themselves. While they declare in words they always claimed title to the land, they admit and state facts that show such declaration to be without foundation.

As stated in the original opinion, Railey's title was acquired by plaintiff, and we are also of opinion that Dodson and Howell, by their repeated recognition of Railey's and plaintiff's title by renting from them, have estopped themselves from setting up title against plaintiff for all of the lands described in plaintiff's declaration, except the 12 acres, and 101 acres in favor of plaintiff will be affirmed, and the judgment against him for the 101 acres, in favor of defendants, as described in the verdict, is erroneous and will be reversed, and to this part of the land, to-wit, the 101 acres and 91 poles, as described in the verdict, a new trial is granted, and judgment here and writ of possession will issue for the residue of said land as described in the verdict.

The judgment entered in this case on a former day of this term affirming the judgment, will be vacated and annulled, and judgment will be entered in conformity with this opinion, and judgment will be rendered for costs below as to the land recovered and of this court against all the defendants.

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THE TENNESSEE CLUB OF MEMPHIS v. OWEN
DWYER *et al.*

SOCIAL CLUBS. *Selling liquors.* A social club organized under the act of 1875, ch. 142, sec. 1, sub-secs. 3 and 5, maintained a library, gave musical entertainments, afforded meals for its members, and kept a small stock of liquors, which were for the use of its members, members paying for each drink as it was taken, but no profit was made for the club upon the liquors, the stock of which was in part kept up by the monthly dues of members. *Held*, the club was not liable to pay a privilege tax as a retail liquor dealer.

FROM SHELBY.

Appeal from the Chancery Court at Memphis. W.
W. McDOWELL, Ch.

U. W. MILLER and S. P. WALKER for complainant.

ATTORNEY-GENERAL Lea for the State.

COOKE, Sp. J., delivered the opinion of the court.

By the act of 1875, ch. 142, sec. 1, sub-secs. 3 and 5, it is provided that charters may be granted to any association of individuals for the following purposes: Sub-sec. 3: The support of any literary or scientific undertaking, as a college or university, with powers to confer degrees, an academy, a debating society, lyceum, the establishment of a library, the support of a historical society, the promotion of painting, music, or the fine arts, the support of boards of trade or chambers of commerce, or other objects of like nature.

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And by sub-sec. 5: The maintenance of clubs for social enjoyment, gymnastics and gymnasium clubs.

Under these provisions the complainant was incorporated for the general objects as stated in its charter, of establishing a miscellaneous library, lyceum and art gallery in connection with reading and club rooms for social enjoyment; for the purpose of cultivating literary, scientific and æsthetic learning and taste, and of promoting social feeling and intercourse generally among the members of the corporation, so far as all acts for the accomplishment of these ends may or can be authorized under the legislation of the laws of Tennessee, and especially under sub-sections 3 and 5 of section 1 of above recited act.

In accordance with the provisions of the second section of said act, it was provided in said charter, section 6, "that the general welfare of society, not individual profit, is the object for which this charter is to be granted, and hence the members are not stockholders in the legal sense of the term, and no dividends or profits shall be divided among the members. The members may at any time voluntarily dissolve the corporation by a conveyance of its assets and property to any other corporation holding a charter from the State for purposes not of individual profits, first providing for the corporate debts. That a violation of any of the provisions of the charter shall subject the corporation to dissolution at the instance of the State."

The complainant, the Tennessee Club, was organized under this charter with a membership of 200 persons, each of whom, by the established regulations of the

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organization were required to pay an initiation fee of \$50, besides a tax upon the membership of \$3 per month, to pay the current expenses of keeping up the club, such as rent of rooms, servant's hire, periodicals, etc. One of its leading features being musical entertainments by amateurs, at which the daughters and lady friends of the members participate. In another sense the club is used as a home except for lodgings, and some of its members spend much of their time there every day. No one but members of the club have admission to the same save friends of members, living and residing outside of Shelby county. Strangers from a distance are entertained at said club by being introduced there by the members, and have the privilege of its reading room and parlors. The leading daily, weekly and monthly periodicals are taken and kept in its reading room, and a general library of books. And among other things the complainant keeps within its club a small stock of liquors, wines and cigars, which are dispensed to its members at a price fixed by a governing committee, not with a view, however, of making any profit, which is expressly forbidden by the 6th clause of its charter, but simply for the accommodation and convenience of its members. The money paid for refreshments is reinvested by the secretary of the club, in like refreshments used and consumed by its members. The liquors and refreshments are in the charge and custody of an officer and servants of the club, who are in attendance to wait on its members. The object of the sale of said liquors is not for the purpose of profit as before stated, but merely for the

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purpose of covering the outlay in the purchase thereof by the corporation and the expense attending upon the keeping and serving thereof at the club house. Not only is there no profit made by the sale of liquors, which is alone to its members, but a portion of the monthly dues and initiation fees are appropriated to keeping up the supply.

This mode of furnishing refreshments to its members was interrupted by Capt. Dwyer, who, as clerk of the county court, issued a distress warrant against the complainant for \$61, under a claim that said amount was due from complainant as a retail liquor dealer; said sum being claimed as a license tax as such for three months, and placed the same in the hands of respondent, Garvey, a constable, who levied it upon the property of complainant, complainant wholly denying that it was a retail liquor dealer, offered, however, in order to test the question of its liability, to pay said sum, under protest, and tendered the money and demanded a receipt therefor showing that the same was paid under protest; but said clerk refused to receive said sum demanded in the distress warrant and costs or receipt for the same unless the complainant would take the oath and give the bond required of retail liquor dealers, which complainant declined to do, and filed this bill to enjoin the execution of said distress warrant, and to enjoin said clerk from issuing any more distress warrants against the plaintiff, or seeking in any manner to hold it accountable or proceed against it as a retail liquor dealer.

An injunction was granted, but the chancellor, upon

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motion of respondent, dismissed the bill for want of equity upon its face, and the complainant has appealed. Any question as to the jurisdiction of the chancellor to grant an injunction in a case like this, provided complainant is not liable to said tax, has been waived by the parties, and the only question for determination is, was the complainant a retail liquor dealer within the purview and meaning of our statutes upon that subject, and liable to be distrained for said taxes as such?

All of the foregoing facts, as well as a specific denial that the complainant was or is a retail liquor dealer, is specifically averred and set forth in the bill, which upon a motion to dismiss are taken as true. Assuming then, the facts to be just as stated, do they constitute the complainant a retail liquor dealer under the laws of Tennessee upon that subject?

This is a question of first impression in Tennessee, and we are left to determine it upon general principles.

By the 8th section of the charter of the complainant, it is expressly provided "that the means, assets, income or other property of the corporation shall not be employed directly or indirectly, for any other purpose whatever, than to accomplish the legitimate objects of its creation, and by no implication or construction, shall it possess the power to issue notes or currency, deal in currency, notes or coin, *buy and sell products, or engage in any kind of trading operation.*"

By the act of 1881, ch. 149, sec. 4, retail liquor dealers shall be taxed as *other merchants*, and in addition shall pay a tax as follows: "Where they do business at

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any place not in a city or town, or in a city or town of 1,000 inhabitants or less, \$150 per annum; in a city or town of more than 1,000 inhabitants and less than 5,000, \$150 per annum; in a city or town of 5,000 inhabitants or over, \$250, quarterly or semi-annually in the same proportion."

Questions very similar to the one before us have arisen in some of the other States. We have been referred to an Alabama case, *Martin v. The State*, 59 Ala., 34, where the agent of a corporation had sold liquor to its members under circumstances apparently very similar to this case, as appears from the statement furnished us, and was indicted under a statute of that State for having sold spiritous liquors without a license. We have not the statute before us upon which the indictment in that case was predicated, but the question seems to have turned entirely upon whether or not the facts of that transaction constituted a *sale*, and it was held that they did, and the conviction was sustained. How far the principle determined in that case is involved in this would depend very much upon the terms of the statute under which the defendant there was indicted.

The next case to which we have been referred as sustaining the action of the chancellor, is that of *Marmont v. The State*, 48 Ind., 21. That was also an indictment upon a statute of Indiana for selling beer on Sunday. The facts of that case were that there was a German club in Indianapolis, which met on Sunday for social and political purposes. The secretary, by order of the club, on each Saturday purchased

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a keg of beer which was sold to the members of the club only, and the court held that this was a sale by the club to its members. From this brief statement of the case which has been furnished us, we are unable to see whether or not that case is an authority either way upon the question in this case.

We have been also referred to the case of *Ricart v. The People*, 79 Ill. R., 85. That was an indictment against the defendant who claimed to be secretary of a club, for selling liquors without a license. The facts of that case were that the defendant, who was a saloon keeper, sought to evade the law by a pretended sale of his liquors to his customers who formed themselves into a club and elected him their agent, under the title of treasurer. Persons became members by purchasing tickets, which entitled them to a certain amount of liquor, estimated according to the price of drinks and the amount paid, etc. It was thereby held by the court that the whole thing was a wise device to evade the law, and the conviction was sustained.

A similar question, in some respects, to the one now under consideration, arose in Massachusetts. There several persons formed themselves into a club, of which the defendant, Smith, was a member. They each advanced a certain sum of money which was put into a common fund, the defendant was chosen agent of the club, and under its instructions purchased liquors and refreshments for the club. The fund was taken by the defendant and invested for them, and a certain number of checks, of the amount of five cents each, were delivered to each member of the club to the

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extent of the money advanced by each; these checks were transferable only to other members of the club. Upon presentation of the checks by a member to the defendant, he would deliver to such member the liquor of the club to the amount of the check presented. After the distribution of the liquor upon all the checks issued, about one-fifth of the original purchase remained, which the defendant as such agent, was to have for his services in selling and for the use of his room by the club.

Upon the defendant being indicted for a sale to one of the members, it was held that these facts did not necessarily and as a matter of law, constitute a sale of the liquor by the agent to the members; but that it was a fact for the jury, whether this arrangement was *colorable* and a mere evasion of the law or not. The court said if the liquors really belonged to the members of the club, and had been previously purchased by them or on their account, of some person other than the defendant, and if he merely kept the liquors for them and to divide among them according to some previous arranged system, these facts would not justify a jury in finding that the defendant kept a nuisance for the illegal keeping and sale of intoxicating liquors: *Commonwealth v. Smith*, 102 Mass., 144.

In the case of *Seim v. The State*, 55 Md., 566, a report of which is contained in the Maryland Law Record of April 30, 1881, the Supreme Court of Maryland, upon a case almost identical in its facts with the one now under consideration, held that the sale of liquor to the members of a club under such an ar-

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rangement, did not constitute a sale of liquors within the meaning of the statutes of that State, prohibiting the sale of spiritous liquors.

In a case recently decided in the High Court of Justice, Queen's Bench Division, in England, it was decided, in relation to a club almost identical in its objects, organization and mode of furnishing refreshments to its members, with the complainant club, that the sale of liquor by a club to its members, either for use on the premises or off of them, is not a sale within the meaning of a statute prohibiting any person from selling by retail intoxicating liquors without a license: Am. Law Reg., February, 1883.

We incline to adopt the reasoning of the cases last cited as more correct, and are of opinion that the facts stated in the bill do not constitute the complainant a retail liquor dealer within the meaning of the clause of the act of 1881, above quoted. It is clear from the allegations of the bill that the liquors kept by the complainant was not kept for sale to the public or as a traffic, nor was the public admitted to its rooms. No person but members were admitted except strangers who live outside of Shelby county, and they only upon special invitation of the members, and they are not permitted to purchase any liquors or refreshments. The liquors are purchased out of the common fund and are kept for the exclusive use of the members of the club. They are not sold for or at a profit, but the price the members are required to pay for them is regulated by the governing committee, is less than the original cost and goes back into the

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common fund. They are served by a servant of the complainant, who is employed at a salary and has no interest whatever in the liquors or their proceeds, and we think it is clear from the statements of the bill, that the mode of sale as it is termed, to the members at a rate fixed by the governing committee of the club, is only in fact an equitable and convenient mode of distributing refreshments to its members, which are provided by the club for them exclusively.

It cannot be controverted but that the complainant would have a right to purchase and keep liquors at its club rooms for the use of its members, and to distribute it among them in any method it might deem proper, and to raise funds for the purpose of replenishing by assessments upon the members, and the mode adopted of the form of a sale alone to its members of such a quantity for so much money, can be nothing more than a mode adopted of assessing each member in proportion to the amount he consumes, and cannot be distinguished in principle from that adopted in one of the cases referred to, of issuing checks to each member, which entitles him to so much liquor each, according to the amount of money he contributes.

We think, moreover, that it was not the purpose of the Legislature to class clubs organized and conducted as the complainant, as retail liquor dealers, or to impose a tax upon them by the provision of the act above cited. It will be remarked that it provides that retail liquor dealers shall be taxed as *other merchants*, and requires an additional tax which is graded in amount according to the population of the town or

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city in which such retail traffic is carried on. Thus clearly indicating that retailers of liquors to the public was contemplated by said act.

Again, the provision that retail liquor dealers should be taxed as *other merchants*, indicates that it was the intention of the Legislature to impose this tax upon those who engaged in the retailing of liquors as a business.

In the case of *The State v. Smith*, 5 Hum., 394, this court, in construing a revenue act, held that to constitute a *merchant* in the meaning of the revenue laws, *the business* of buying and selling should be the pursuit and vocation by which the party makes his living. In that case the preceptor and proprietor of an extensive female school, had between fifty and a hundred pupils and tutoresses boarding with him and members of his family. To supply these persons with clothes, books, etc., he kept on hand a supply of such articles of clothing and stationery as they might need, and furnished these articles not with a view of profit, but to accommodate his pupils and keep up his school. He sold to no person not a member of his family. Held that he was not a merchant, or subject to be taxed as such.

Upon the whole case, as made by the bill, we conclude that the complainant was not a retail liquor dealer within the meaning of the statute, that it was not required to pay said tax or take out a license as such, and that the distress warrant was wrongfully issued and levied upon its property; and that the chancellor's decree dismissing the bill for want of equity upon

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its face, was erroneous, and will be reversed and the cause remanded to be proceeded in according to law and the rules of that court. Respondents will pay the costs of the cause in this court.

CALDWELL & HAYS v. J. P. MCFARLAND *et al.*

1. **LIMITATIONS.** *Seven years in favor of heirs.* The statute of limitations of seven years in favor of heirs and devisees, Code, sections 2786 and 2281, establishes positive prescriptions, and does not operate upon the remedy merely, but extinguishes the right, and is a conclusive bar, whether pleaded in form or not.
2. **SAME.** *Same. Agreement construed.* An agreement by the devisees with the executors, executed more than seven years before suit brought, to pay *pro rata* any amount found to be necessary to satisfy the indebtedness of the estate, means merely that the devisees will hold the land received subject to their proportion of debts found due, by due course of administration, and does not waive any benefit of the statute, nor remove the bar from a suit brought by the executors more than seven years after administration granted, seeking to subject lands to payment of surplus over personal estate by them expended in satisfaction of the debts of the devisor.
3. **LIFE TENANT.** *Remainderman.* Taxes paid accruing during the life tenant, and funeral expenses of such tenant, cannot be charged on the remainder estate.

FROM GIBSON.

Appeal from the Chancery Court at Trenton. JOHN SOMERS, Ch.

CALDWELL & CALDWELL and M. M. NEIL for complainants.

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L. W. JONES and SPL. HILL for defendants.

FREEMAN, J., delivered the opinion of the court.

In November, 1867, Mrs. Harriet Cowan died in Gibson county, leaving a will, which was duly proven at November term, 1867, of the county court, by which she gave to a son, Seth C. Cowan, a life estate only (on the facts shown to have occurred), in the property of which she died possessed. The legal title to this property was vested in J. W. Hays and L. M. Caldwell, two sons-in-law, who were to manage and control the property, so that the usufruct alone should go to the son for life, and after his death, he dying without children, it was to go to his next of kin. It is not contested that he took but a life estate in the equitable interest given under the will. In July after the probate of the will, the devisees being desirous to have the lands divided before the administration should be completed, or the estate settled, most of them signed, or had signed for them, the following agreement:

“We, the undersigned heirs at law of Mrs. Harriet A. Cowan, do hereby bind ourselves to abide by the division by allotment of the landed estate of said H. A. Cowan and the valuation as made by the commissioners; and further agree to pay in proportion to our part, to Caldwell & Hays, administrators, any amount found to be necessary to satisfy the indebtedness of the said estate, and hereby pledge our part or a certain portion of them, enough to pay and satisfy any and all claims that may prove just and correct against said estate.”

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This was signed by several of the devisees, who were *sui juris*, by a *feme covert*, by her husband as attorney in fact, by another and her husband, and Caldwell & Hays, trustees for Seth C. Cowan, but was never registered, or acknowledged separately by the married women.

We need but say here of this instrument, that it gives no rights which could in any view affect the rights of McEwen, a creditor of J. T. Cowan, in any way, if in fact it affects materially the rights of any one in this case.

The facts are, that Seth C. Cowan died, perhaps in 1879, and this property went under the will to his heirs, his brothers and sisters, or their descendants. The house and lot in controversy in this case was allotted to said Seth C. Cowan. We ought to have stated that Caldwell & Hays had qualified as the representatives of the estate of Mrs. Harriet A. Cowan, and were settling up said estate when the above agreement was made.

A few days after the death of Seth C. Cowan, Caldwell & Hays, as administrator of Mrs. Harriet A. Cowan, filed their bill in the chancery court at Trenton, seeking to subject the house and lot, which went to the next of kin of Seth Cowan, to a large balance, or his proportion of it, claimed to be due them for moneys paid for the estate of Mrs. Cowan, over and above the assets received by them. Hays, in this bill, sought to be reimbursed, out of this lot, for taxes paid by him on the property during the life of Seth Cowan, the life tenant, and also for doctor's bills

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and funeral expenses. This bill being filed nearly twelve years after administration, and about ten after the time when said estate should have been settled up.

The statute of limitation of seven years, in favor of heirs and devisees, was held by the chancellor to be a conclusive bar to this demand by the administrators, and in this he was correct. So far as this claim was against the estate of Mrs. Cowan, secs. 2786, 2281, Code, have always been held to establish positive prescriptions, and to extinguish the right, and not to operate solely on the remedy. In such cases, wherever insisted on, they make a conclusive bar, whether pleaded in form or not. See cases cited in note to T. & S. Code, vol. 2, sec. 2281; on last point, *Bomar v. Hagler*, 7 Lea, 89.

The informal and imperfect agreement referred to cannot change this result. It was executed only a few months after administration granted, and, fairly construed, could only mean that the parties signing it, would hold the land, received in the division of the estate of Mrs. Cowan, subject to their proportion of the debts found due, by due course of administration, in the same way they would have been liable if no such partition had been had. There is nothing in it which could be construed as waving any benefit of the statute of limitations or lapse of time.

As a matter of course, the life estate having terminated, the taxes paid accruing against the life tenant, nor funeral expenses of such tenant, could not be charged on the remainder estate. The chancellor decreed correctly on this branch of the case.

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Some of the parties did not answer in this case, and had orders *pro confesso* taken against them; others answer, however, and the case made in the record clearly removes all equity set up by Caldwell & Hayes, and all being tenants in common of the land, there being shown beyond doubt no existent right whatever in the bill of Caldwell & Hays, we think it a proper case for the application of the rule, that where two defendants are jointly interested or joint defendants answer and meet all the equities of a bill, and this is sustained by the proof, no decree should be rendered against those not answering: 8 Hum., 500; 2 Cold., 395; 10 Hum., 555. This rule may be subject to qualification, and not be of universal application, but we think in this case may be safely applied, when the debt claimed is clearly shown to be extinguished, and no right whatever of recovery in the complainants.

McEwen, who filed his bill as creditor of J. T. Cowan one of the heirs of Seth C. Cowan, was given priority according to the date of his proceeding, and in this the chancellor was correct.

The chancellor's decree was, on the whole, the proper decree to be made in the case, and is affirmed with costs.

A decree will be drawn affirming the same in accord with this opinion.

Jones and Perry v. The State.

GEORGE JONES and MANUEL PERRY v. THE STATE.

1. SUPREME COURT PRACTICE. *Evidence. General exception.* Where the ruling of the trial judge in rejecting testimony indicates that he understood it to be offered for a purpose for which it was inadmissible, he cannot be put in error by a mere general exception, which does not call to his attention another purpose for which it would have been admissible.
2. SAME. *Proper exercise of discretion presumed.* The presumption is always in favor of the proper exercise of judicial discretion in the conduct of a trial, and it must affirmatively appear that injustice has been done before the Supreme Court will reverse for the abuse.
3. SAME. *Same* The trial judge may require counsel to reduce the answers of witnesses to writing, and to read each answer over to the witness before proceeding with other questions.

FROM SHELBY.

Appeal in error from the Circuit Court at Bartlett.
THOS. D. ELDRIDGE, J.

GEORGE GANTT and W. S. FLIPPIN for Jones and Berry.

ATTORNEY-GENERAL LEA for the State.

COOKE, Sp. J., delivered the opinion of the court.

The defendants were indicted for the larceny of a hog, and upon a former trial were convicted, and the verdict set aside and a new trial granted by the court. They were again tried and convicted, and a new trial having been refused them, have appealed to this court.

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The principal witness as to the guilt of the defendants, was one Lilly Edwards. The State also introduced as a witness, a girl, Mary Miles, who testified to material facts going to establish the guilt of the defendants.

On cross-examination this witness stated, "I have talked with aunt Lilly, and she told me what to say."

On re-examination this witness said, "she told me to tell the truth. Uncle George Smith and his wife both told me to tell the truth." Then, as the record states, witness was here re-called by the State, and upon examination in chief said: "Ceney Bartlett did come to me and ask me what I knew about this case, and offered me a pair of shoes and a dress to say that uncle Toss (meaning Jones), did not kill or clean any hog there that night." Re-cross-examination: "I did say at Mr. Bland's residence, in the presence of Mr. and Mrs. Bland, that I knew nothing about the case, and knew nothing about Jones and Berry killing a hog on that night, or cleaning one." Counsel for defendants then put this question: "Have you not recently talked this case all over with Lilly Edwards, and did she not tell you that you must state the facts just as she stated them to you?" The court overruled the question because Lilly Edwards had not been asked the same question, or if she had not made such proposal, to which the defendants, by counsel, excepted.

This ruling of the court, it is insisted, was error. His Honor evidently assumed that the object of the question was to impeach or discredit the testimony of the witness, Lilly Edwards, and upon this assumption

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his ruling was correct. We can see, however, that the counsel for the defendants *might* have had another or an additional object in asking the question, that is, to show that the witness then under examination had been tampered with, and instructed as to what testimony she was to give, and thus to discredit her own testimony. But as the court indicated by his ruling, the object for which he understood the question to have been asked, and as defendants' counsel did not state or call the attention of the court to any other purpose for which the question was propounded, he cannot, by a mere exception, without stating the ground of it, put the court in error, as if the attention of his Honor had been called to any purpose for which it was competent, we must presume he would have permitted it for such purpose.

On the trial of the case, the court required the counsel for the defendants in cross-examining witnesses to write the answers of each witness and read it over to them to see if he had written it down correctly, and that it expressed their meaning. To this the counsel excepted, but complied with the requirement.

While this may not be a proper mode of procedure in all cases, we can conceive of instances where such a course of examination might be pursued by counsel as to render such a requirement a proper exercise of the discretionary power of the court.

The discretion confided to the circuit court in the conduct of business, will not be readily controlled by this court: *State v. Pybass*, 4 Hum., 442. And unless the exercise of the discretion is erroneous and injurious,

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it will not be interfered with: *Waterson v. Waterson*, 1 Head, 8. The presumption is always in favor of a proper exercise of judicial discretion, and we must be able to see that injustice has been done, before we would undertake to reverse a cause for the abuse of it.

We can see no evidence from this record, of any injury which has or might have resulted to the defendants from the course pursued by the circuit judge in this matter. We find no reversible error in the record and are satisfied to permit the conviction to stand.

The judgment will be affirmed.

W. R. HALLIBURTON v. M. A. JACKSON.

PRACTICE. *Lost justices' warrant. How supplied.* When an original justices' warrant has been lost or destroyed, the circuit court cannot condemn law until the warrant is supplied; and this cannot be done by the justice certifying to a copy of the original warrant.

FROM LAUDERDALE.

Appeal in error from the Circuit Court of Lauderdale county. T. J. FLIPPIN, J.

STEELE & STEELE for Halliburton.

G. C. PORTER for Jackson.

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DEADERICK, C. J., delivered the opinion of the court

Jackson procured a judgment of condemnation and sale of Halliburton's land, from which the latter has prosecuted a writ of error.

The papers which were returned into the circuit court of Lauderdale county, by a justice of the peace of said county, consisted of his, the justice's, *certificate* of the loss of the original warrant or summons, together with what purported to be a copy of said summons or warrant, the return of the officer thereon, and the judgment of the justice thereon; also a certificate that the note on which the suit was brought had been lost or mislaid, and a copy thereof made by said justice. These, with the execution issued by him, and the return of the officer thereon, constituted the papers on which the judgment of condemnation of land, levied on by the constable, was ordered by the circuit court.

When an execution issued by a justice is levied upon real estate, the officer making the levy should return the execution to the justice, properly setting out his levy, and the justice should return the original papers to the circuit court at its next term thereafter. There the justice's warrant and officer's return thereon, the judgment, execution, levy, etc., is entered upon the minutes of the circuit court, and judgment of condemnation is entered: Code, secs. 3080, 3081 and 3082.

It will be observed that the justice is required to send up the original papers before him. But in cases of destruction, by fire, or otherwise, of the "docket

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book and original papers" belonging to the office of any justice of the peace, section 3070 *a* of the Code prescribes the manner of supplying the lost paper. The justice is required to make oath to the destruction, then the plaintiff, or his agent or attorney, shall also make affidavit of the papers lost, as near as may be. So section 3901 directs an affidavit by some one acquainted with the facts, in order to supply any lost instrument. And section 3907 requires that the *best evidence* the nature of the case will admit of, should be given, in order to supply any record, proceeding, or paper in an action at law or equity.

These several sections require something more than a mere certificate of the custodian of a paper, to establish its loss. The facts stated should be under oath.

In this view, the papers sent up by the justice to the circuit court, were not those required by law, and did not authorize that court to render judgment of condemnation and sale of the land.

The judgment must, therefore, be reversed, and judgment rendered here against plaintiff for costs of this court and court below.

Whitesides v. The State.

SOLOMON WHITESIDES v. THE STATE.

CRIMINAL LAW. *Attempt to commit statutory misdemeanor.* A mere attempt to commit a statutory misdemeanor is not indictable.

FROM SHELBY.

Appeal in error from the Criminal Court of Shelby county. L. B. HERRIGAN, J.

JOHN T. MOSS for Whitesides.

ATTORNEY-GENERAL LEA for the State.

COOKE, Sp. J., delivered the opinion of the court.

By the act of 1879, ch. 166, sec. 1, it is enacted: "That it shall not hereafter be lawful in this State, to buy or sell; barter or exchange, or receive on deposit, any cotton in the seed, or ginned but not baled, between the hours of sunset of any one day, and sunrise of another." By section 2 of said act it is provided that any merchant, or other person, violating the first section shall be guilty of a misdemeanor, etc.

The defendant, Whitesides, was indicted for removing one hundred pounds of his own cotton in the seed, between the hours of sunset of the 9th of December, 1882, and sunrise of the next day, with the *intent* and for the *purpose* of selling the same between the hours of sunset and sunrise, as aforesaid, and by which means, it is averred, he unlawfully attempted to sell said cotton between said hours.

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The defendant moved to quash said indictment, which motion being overruled, he entered a plea of not guilty; was tried upon said indictment and convicted, and thereupon he filed reasons in arrest of judgment. First, that the indictment does not charge a public offense, and that the act of attempting to sell cotton after dark is not a public offense, and especially so when it appears that the cotton attempted to be sold was the property of the accused. The court overruled said reasons in arrest of judgment, and defendant's motion for a new trial having been overruled, fined him \$25, and he appealed to this court.

By section 5222 of the Code, it is provided that the defendant may be found guilty of any offense, the commission of which is necessarily included in that with which he is charged, whether it be a felony or misdemeanor. But there can be no degrees of guilt included in a misdemeanor, and no less grade of criminal offense than a misdemeanor. As the offense of selling cotton in the seed or unbaled between sunset and sunrise is purely statutory, and as the Legislature has not declared the attempt so to sell cotton criminal, or indictable, we are of opinion that such attempt is not within the purview of the act of 1879 above cited, or embraced within the provisions of the Code above referred to, and therefore is not indictable as a separate misdemeanor. The court below, therefore, erred in refusing to quash the indictment, and also in overruling the reasons in arrest of judgment.

The case will be reversed, the judgment arrested, and the indictment quashed.

State v. McKittrick.

STATE OF TENNESSEE v. MCKITTRICK.

PRACTICE. *Justices. Special constable.* A justice of the peace has no power to appoint a special constable to execute a *fi. fa.*

FROM SHELBY.

Appeal in error from the Criminal Court of Shelby county. L. B. HERRIGAN, J.

ATTORNEY-GENERAL LEA for the State.

JOHN T. MOSS for McKittrick.

FREEMAN, J., delivered the opinion of the court.

The defendant was indicted for an assault and battery on one Murphey. The jury returned a special verdict, finding the defendant guilty, provided Murphey was a duly appointed officer, authorized to levy on defendant's property, but if he was not, then he was innocent.

The facts are that about two years before, defendant had been sued before a justice and judgment had; after this lapse of time the plaintiff in that judgment made application for an execution, and filed a proper affidavit for the appointment of Murphey as a special constable to execute it. In the attempted execution of this process the difficulty occurred.

The case turns on the proper meaning of section 4148 *a* of the Code, act of 1869-70. By the Code

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as it then existed, section 4148, it was provided: "A justice may, in writing, specially depute any discreet person of full age, not being a party, to perform any particular duty devolving upon a constable, if no constable is at hand and the business urgent."

The act referred to, however, section 4148 *a*, amends the above section as follows: "A justice may, in writing, specially depute any discreet person of full age, not a party to the *suit pending*, to perform any particular duty devolving by law upon a constable, if no constable is at hand and the business is urgent; but no magistrate shall make such special deputation unless one of the parties to a suit pending, or his or her attorney shall make oath," etc.

The only feature of amendments to the former law is to limit the power of the magistrate, to the case of *a suit pending*. What good reason there may have been for this we may not clearly see, but so it is declared, and we have but to enforce it.

There was no suit pending in this case. It had been ended two years before and a final judgment had—which only remained to be executed. His Honor so ruled, and we affirm his judgment.

Riddick v. Turpin.

A. J. RIDDICK v. J. H. TURPIN *et al.*

HOMESTEAD. *Abandonment. Case stated.* In 1873 A sold, without the concurrence of his wife, who had deserted him, taking their only child with her, and was at the time residing at her father's, a tract of land, at the time under lease to a third party; A assigned the purchase notes and the assignees filed a bill to enforce the lien and obtained an order of sale, whereupon A filed a bill to obtain homestead in the land. *Held*, A is not entitled to homestead. *Quere.* Is the wife?

FROM CROCKETT.

Appeal from the Chancery Court at Alamo. JOHN SOMERS, Ch.

GOODLOE & MAHON for complainant.

BUCHANAN & COOPER for defendants.

FREEMAN, J., delivered the opinion of the court.

The facts of this case are, that in March, 1873, complainant owned a tract of land of about 140 acres in Crockett county. This land he agreed to sell and did sell to F. M. Riddick, and gave him a bond for title—the consideration being four notes due yearly from date of sale, each note being for upwards of \$1,000.

These notes were transferred to Turpin, and Hardin & Avery, to the former as part of the purchase money of a house and lot in the town of Bell's Depot, to the latter as collateral security for a debt due from Riddick & Son. The holders of these notes have filed

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their bills to enforce the vendor's lien, and obtained a decree ordering said land sold. This bill is filed by complainant, the original vendor, to assert his right to homestead, charging that he is the head of a family, lived on the land at the time of the sale, and his wife did not join in it, or have any connection with it whatever, and that he never, in any way, abandoned said claim.

This is all denied in an unsworn answer, at least so far as the main allegations are concerned.

The proof shows this state of facts. That at the time of selling the land, the complainant and his wife had separated—she having, for some cause, abandoned him, as he says, on account of disagreement as to family matters, and she had gone to her father's to live, taking her child, then quite young with her. She has continued thus to live up to the present. The child, since it was five or six years old, say for the last few years before this suit, had been permitted to visit the father, and probably stayed with him one-third of the time. He surrendered possession of the place to the purchaser, though he seems not to have actually occupied it until 1874, it having been rented out at the date of the sale, in March, 1873, for the year.

The only question is whether the husband, on this state of facts, is entitled to assert a right to homestead to the land thus sold.

We hold he is not so entitled. He was not occupying it with his family as such; at date of the sale it was rented out, and the wife had left his home as

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indicated by the proof, with no purpose to return. He surrendered his right to possession, and has not occupied it as a homestead or his permanent residence since, having been on it permissively as a tenant only for a time. We confine this decision strictly to the facts of this case.

What may be the right of the wife in the premises we do not decide, but only that on these facts, the husband alone cannot, as against his vendee or the holders of the paper for purchase money in this case, assert by this proceeding a right to homestead. The chancellor so held, and we affirm his decree with costs.

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SUPREME COURT PRACTICE. *Reversal.* The manner of the examination of witnesses is left largely to the discretion of the trial judge, and the Supreme Court will not reverse unless it affirmatively appear he has committed error. It is not error for the trial judge to say to counsel, in the presence of the jury, that he is treating a witness unfairly and harshly. and that *there was nothing wrong or improper in her conduct* to justify such treatment, where it is plain such remark had reference to the demeanor, and not to the testimony of the witness.

FROM SHELBY.

Appeal in error from the Circuit Court at Bartlett.
THOS. D. ELDRIDGE, J.

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W. S. FLIPPIN for Carroll.

ATTORNEY-GENERAL LEA for the State.

DEADERICK, C. J., delivered the opinion of the court.

Defendant was convicted in the Bartlett circuit court of petit larceny, and sentenced to one year's imprisonment in the penitentiary. A new trial having been refused he appealed in error to this court.

The offense charged was the stealing of a hog, and the principal witness in the case, and the only one as to the facts of larceny, was a young colored girl of about sixteen years of age. Her evidence, if credible, makes a clear case of guilt. But objection is taken to the rulings and declarations of the court pending the cross-examination of this witness, by defendant's counsel. The bill of exceptions shows that the court, several times during the cross-examination, told defendant's counsel that he asked his questions too rapidly, and did not allow the witness time to make her answers before asking other questions. Also, that the manner of counsel, "in addressing the witness, and his remarks about her testimony, were so rough and premature," that he thought it proper to require her cross-examination to be taken more slowly, and to have her answers written down by defendant's counsel, pursuant to a rule of the court, which is also made a part of the bill of exceptions. By this rule of practice, the counsel for the State and defendants, in felony cases, shall write down the testimony of their witnesses and read the same to the witnesses before they leave the

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stand; but the rule may, in the discretion of the court, be relaxed. The object of the rule is to avoid disputes as to the testimony given, and to facilitate the making of bills of exceptions upon appeals.

In this case, defendant's counsel objecting to being required to write down the evidence on cross-examination, was excused from doing so, and the Attorney-General was required to do it; thereupon defendant's counsel proceeded to write down the answers of the witness.

The court stated that he did not require defendant's counsel to write down the witness' answers on cross-examination, but allows him to do it if he wishes. He said that the cross-examination was not conducted, nor the witness treated with the fairness that her age and sex required, and in consequence, the court and jury could not satisfactorily know what the witness meant by her answers; that the cross-examination was too severe, not allowing the witness time enough to answer, and that it was his duty to protect the witness, who was doing nothing to justify such treatment, and that he saw nothing wrong or improper in her conduct.

The manner of the examination of witnesses is left largely to the discretion of the trial judge. The great object is to elicit the truth. These examinations are conducted orally in open court in the presence of counsel, court and jury, and our practice has been, and still is, in making up bills of exceptions, for the court to settle any difference between counsel as to the evidence. But this is but a question of practice, and if no right of defendant is thereby prejudiced, a different mode of attaining the same object could not be regarded as re-

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versible error, even if in the opinion of this court, the mode adopted should be considered as less efficient than a different one would be.

It is argued that the efficiency of the cross-examination is impaired by the rule. No doubt it might thus operate if injudiciously or indiscreetly applied. For the rapid examination of an unprincipled witness may prevent him from fabricating answers, and detecting the drift of the questions: 1 Greenl. Ev., sec. 446, and note at end of the section.

But the questions should not be so rapidly asked as not to allow time for answers, and that was what the circuit judge complained of in this case.

The facts are not so represented in the bill of exceptions, as to enable us to say that his Honor was wrong in so declaring, and in saying that he saw nothing wrong or improper in witness' conduct, to justify rude treatment of her. This undoubtedly had reference to her demeanor and not to her testimony, as the judge very distinctly stated to the jury that they were the exclusive judges of her credibility, and upon this he could give them no opinion.

It must be shown in this court, affirmatively, that the court below has committed error before we can reverse. We cannot see from this record that such error, to the prejudice of the prisoner, has been committed in this case.

The jury, upon a proper charge, have believed the principal witness for the State, and we cannot say that they were not warranted in so doing, and the judgment must be affirmed.

Apperson v. Pattison.

E. M. APPERSON, Executor, v. E. C. PATTISON.

1. LIMITATIONS. *Evidence. Request for delay.* Whether or not a conversation between a creditor and an administrator amounted to "a request for delay," so as to prevent the running of the statute of limitations, is a mixed question of law and fact to be determined by the jury under a proper charge; if the evidence tend to establish such a request, it must be given to the jury, who are to determine its sufficiency.
2. EVIDENCE. *Insolvency.* Evidence showing the amount involved in a suit and the interest of the decedent in it, is inadmissible in a suit between his administrator and one who acted as his body-guard but rendered no other assistance, while decedent was engaged in preparing and securing evidence for such suit.
3. SAME. *Limitations. Onus probandi to remove bar.* The burden of proof of facts necessary to remove the bar of the statute of limitations, which *prima facie* exists, is on the plaintiff.

FROM SHELBY.

Appeal in error from the Circuit Court of Shelby county. J. O. PIERCE, J.

MYERS & SNEED and TAYLOR & CARROLL for Apperson.

GANTT & McDOWELL, M. D. L. STEWART and GREER & ADAMS for Pattison.

COOKE, Sp. J., delivered the opinion of the court.

Pattison sued the plaintiff in error as executor of Wade H. Bolton, deceased, for \$20,000, alleged to be due him for work and labor done and services ren-

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dered, and for money advanced and expended for his testator in his lifetime. The services were claimed to have been rendered to Bolton during the years 1867 and 1868, by going with him and attending him and aiding and assisting him in the preparation of an important suit, which he had pending in the chancery court with one Dickens, in which there was a great deal of hostility between the parties, so much so that Bolton considered his life in danger, and seems to have had Pattison to attend him as a sort of body-guard.

The plaintiff below had a verdict and judgment for \$1,000, and a new trial having been refused, the defendant appealed.

Among other defenses relied upon was the statute of limitations of two years and six months, to which there was a replication that suit was delayed at the special instance and request of the defendant below, until the termination of said suit above referred to in the chancery court, which was still pending, and that after the expiration of two years and six months, by mutual consent and agreement of the parties, said request and agreement for delay was so modified that suit was to be instituted by the plaintiff but not pressed for trial until after the determination of said suit in chancery.

On the trial one Amelia Hodges testified "that Apperson told Pattison that he could not pay the money unless he sued for it, that it was not in the will and he could not pay it unless he sued. He told Mr. Pattison to wait awhile or until the big suit was de-

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cided. He was afraid it might make against that some way, I did not understand exactly how."

This testimony was objected to as being incompetent and irrelevant. The objection was overruled by the court and the testimony admitted, and this is assigned as error.

The ruling of his Honor, upon this exception was correct. The testimony was both competent and relevant. The question as to its sufficiency was a matter for the jury, under proper instructions by the court. This is more clearly shown to be so by a subsequent statement of the witness in her testimony, that they had reference to the suit between Dickens and Bolton, and that Pattison did agree to wait. There are similar exceptions taken to the testimony of other witnesses in reference to the same matter, and which were properly overruled.

Upon the trial the plaintiff offered in evidence the last will and testament of defendant's testator, Wade H. Bolton, which was objected to by the defendant, and the objection overruled by the court, and said will permitted to be read to the jury as evidence. It was not stated on the trial for what purpose this document was offered, but it is now insisted that it was competent, as tending to show that the defendant's testator, Bolton, had the litigation greatly at heart, in which it was alleged he had employed the plaintiff to attend him in its preparation for trial. It is very clear, however, that it was not competent for this or any other purpose, as it contained no reference either to the plaintiff or the subject of his demand in any

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way. On the other hand it did contain large bequests to other parties on condition that they remained faithful to him, and aided him all they could in said litigation with Dickens. And we can readily see how these bequests may have had an improper influence upon the jury, as the plaintiff was setting up a very large demand for alleged services connected with the same litigation.

Again, the plaintiff offered in evidence the answer of said testator, Bolton, to the bill filed in said Bolton and Dickens litigation, which seems to have been for the purpose of settling up the business of a partnership, with which the plaintiff or his demand was in no way connected.

This was objected to and the objection overruled by the court. It was a very lengthy document, containing about seventy-five pages. No specific purpose was specified for which said answer was offered, but it was permitted to be read to the jury as evidence in the cause. It is now insisted that it was competent to show the fact that large amounts were involved in said litigation. In the first place, we are unable to see how the amount involved in that suit could affect the value of the services claimed to have been rendered said Bolton by the plaintiff in this suit, as he was not a lawyer or employed, if at all, on account of any knowledge or skill he possessed in regard to the conduct or management of litigation, but merely as it seems for the protection of the testator, Bolton, from apprehended personal violence by Dickens and *his* henchmen. The contents of said answer were wholly

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irrelevant and immaterial to the matters in issue in this cause, and besides, if that were not so, it was obnoxious to the objection that it was only a part of the record in that case, and could not be introduced without the entire record unless by consent. It contained a great many statements and allegations about various things, and although wholly unimportant to the matters involved in this cause, as it was permitted to go to the jury as evidence without any specific directions, we are unable to tell what conclusions they drew from it, or what effect it had upon their deliberations.

The admission over the objection of the defendant of each of these papers was erroneous, and may have, and most likely did affect the defendant injuriously.

The defendant requested his Honor to instruct the jury in regard to the statute of limitations, that the burden of proof of facts necessary to remove the bar of the statute, which *prima facie* existed, was upon the plaintiff; which the court declined to do. This was error, as the charge was proper, and was not contained, nor any equivalent to it, in the general charge: *Cook v. Cook*, 10 Heis., 464.

For the errors above indicated the judgment must be reversed and a new trial granted.

Lippman v. Boals.

11L 489
16L 286NANNIE LIPPMAN v. J. C. BOALS *et al.*

MARRIAGE SETTLEMENT. *Construction.* Marriage settlements must be construed in the light of surrounding circumstances, and in view of the object and purpose of the contract; and when such settlement expresses that its object was "to secure the wife from want," an absolute right of disposition in the husband must be made to appear by express provision or *necessary* implication.

FROM TIPTON.

Appeal from the Chancery Court at Covington. H.
J. LIVINGSTON, Ch.

SIMONTON, YOUNG & BLACKWELL for complainant.

HUMES & POSTON and SMITH & LAUDERDALE for
defendants.

FREEMAN, J., delivered the opinion of the court.

In 1874, complainant and Alexander Lippman, in contemplation of marriage, entered into a marriage contract, by which certain real estate, together with a number of notes and evidences of debt due to Alexander Lippman, were transferred and conveyed to Jno. W. Calhoun, of Tipton county, Tennessee. The real estate is specifically described, and likewise the notes and evidence of debt, amount and date when due, together with the name of the parties owing said debts.

The main question in the case depends on the true construction of the contract, and grows out of the fol-

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lowing alleged state of facts: The husband after the marriage, assigned a portion of the notes to a firm in Memphis, in payment of debts due by him, averred to have been contracted after the contract—at any rate, not to have been a charge in any way on these notes or property held by the husband at the date of the marriage. The defendants, purchasers, are charged to have had actual notice of the settlement, and as the notes are specifically described, were put on inquiry, at least as to these notes, and therefore took subject to the provisions of the contract. The bill having been demurred to, these facts are substantially stated and admitted.

This bill is brought by Mrs. Lippman, after the death of the husband, to have an account of the proceeds of these notes, so far as collected by the assignees, and to reach some of the evidences of debt remaining intact in Tipton county, in the form of a judgment, perhaps.

The stipulations of the contract, so far as necessary to the decision of this case, are as follows:

It is first agreed that the property should “remain at the *absolute* disposal of said Lippman *until* the solemnization of the intended marriage.”

It is then added: “But this conveyance is made in trust for the following uses and purposes herein declared and set forth, and no other, that is to say, the said Calhoun, trustee, shall permit the said Lippman and wife to have and hold the undisturbed and peaceable possession, use and enjoyment of said property during their natural lives, or during the continuance of the marriage between them, without molesta-

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tion or interference of any kind, and in case of the death of said Lippman, in the lifetime of the wife, or dissolution of the marriage, the said Calhoun is to convey to the wife."

The husband has died and a conveyance has been made by a successor of Calhoun, in accord with the contract.

If this were all of the terms of the contract, it might, with some plausibility be maintained, that Lippman, as well as the wife, had power to transfer and convey the equitable title of the property, and the assignees to call for the legal title in the events that have happened. But there is in the introductory part of the contract, a distinct and definite statement of the primary and controlling object and purpose of this contract, to which we must look in its construction, so as to derive from the whole instrument, as well as the surrounding circumstances, what was the intent and meaning of the parties by what they have said.

That intent is thus expressed, after reciting the fact of the contemplated marriage, it is added: "And whereas, the said Alexander Lippman is desirous of securing to and settling upon said Nannie, certain property, so as to secure her against want in case of adversity, and being not involved by any debt whatever," in consideration of the premises the property is conveyed to Calhoun, etc.

Now in view of this leading purpose, we think it clear, that the subsequent language must be understood and construed, so as to carry out and effectuate this purpose, and certainly not to defeat it.

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It certainly was not intended the husband was to have and enjoy the right of absolute disposition of this property as before, for if so the contract was futile, effected nothing; certainly did not tend to "secure the wife from want."

We hold it to be, at least, reasonably certain, that the husband could not dispose of this property, except by the concurrence of the wife, freely and voluntarily given, and that is enough for this case, as it is averred, that no such consent, either of herself or trustee, was given to the disposition made.

The clause retaining the absolute control and disposition in the husband until after the marriage, implies of necessity, that after that event, the opposite of this would be the case, and that some disposition was to follow, inconsistent with this.

The fact that the property is to be conveyed on death of either party—not what remains—but the entire property, would go far to sustain the view, that no right of disposition as to the corpus, was to be exercised during the coverture at all. We need not decide how this is, however, for the disposition of this case as it stands before us.

The chancellor was correct in overruling the demurrer as to this feature of the bill. The only other question pressed on us is, it is insisted the bill is for a conversion, and the statute of limitations of three years is a bar to complainant's claim. In this the chancellor ruled correctly, holding that it was not a suit for tort, but the tort was waived, and the statute of six years was applicable to the facts of the case.

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The other questions were correctly decided by the chancellor, and his decree is affirmed with costs, and the case remanded to be further proceeded in.

THE STATE for use, etc., v. W. E. BUTLER *et al.*

CONSTITUTIONAL LAW. *Indebtedness of Memphis.* The acts of 1883, ch. 162 and 190, are inoperative and invalid so far as they purport to change or direct the rights of creditors acquired under the act of 1879, ch. 92. A compliance with the provisions of that act conferred rights which cannot be impaired by subsequent legislation.

FROM SHELBY.

Appeal from the Chancery Court at Memphis. W. McDOWELL, Ch.

W. M. RANDOLPH, MYERS & SNEED and M. MERIWETHER for complainants.

GANTT & PATTERSON, POSTON & POSTON, FINLAY & PETERS for defendants.

DEADERICK, C. J., delivered the opinion of the court.

In this case the receiver and back-tax collector for Memphis, appointed under chapter 92, acts of 1879, applied for instructions of the chancery court at Memphis. In his petition or application for instructions, he represents that the act of March 23, 1883, amending section 5 of chapter 92 of the act of 1879, and

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the act of March 27, 1883, which makes the indebtedness due policemen, firemen and other employees for 1878 and January, 1879, receivable for the general taxes of 1875 and 1876, materially modify the character of indebtedness receivable for back-taxes. The receiver was notified by attorneys of creditors not to proceed to collect under said acts of 1883, as they would contest their constitutionality.

The receiver exhibited with his petition, tables showing in what the debts of Memphis, incurred prior to the repeal of its charter, were payable by the acts of 1879, and how far, and in what particular, modified by the acts of 1883.

Upon argument, the chancellor held the acts in question valid, and decreed accordingly, and a number of the creditors have appealed to this court.

Under the act of 1879, the receiver and back-tax collector therein are authorized to be appointed by the Governor, was directed to file a bill in the name of the State in behalf of all the creditors, and against all delinquent tax-payers who owed taxes to the extinct corporation, at the time of the repeal of its charter.

This bill was filed under that act. The court in said proceeding was empowered to settle all equities, priorities and liens, and give full relief to creditors and defendants. The taxes, when collected, were to be paid into the treasury of the State, in order that the Treasurer may pay the same according to any lien, priority or equity, if any, which may be declared by the chancery court touching any of said funds, in favor of any creditor or class of creditors.

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The act of 1879 also prescribed the character of indebtedness receivable for back-taxes. It is also provided that publication shall make all creditors parties, and this publication was made, and the filing of claims by creditors, attested by affidavits, if not contested, entitle the same to payment *pro rata*.

The record shows that the appealing creditors "have established claims in this cause." Upon these facts appellants claim that at the time of the repeal of the charter of Memphis, the taxes then due it were vested in the State to be disposed of, for the payment of its debts; that by the act of 1879, those taxes were devoted to the creditors, and the mode of collection and distribution were directed, and having established their claims in this case, the Legislature could not, by subsequent acts, direct the taxes thus declared a fund, or source from which their debts were to be paid, to other uses.

They insist that said acts of 1883 are inoperative to destroy the rights of creditors acquired under the act of 1879, and the proceedings in the chancery court under said act, and that the Legislature had no power to take from the class of creditors, to whose claim they had directed specific taxes to be applied, the taxes thus appropriated, and direct their application to other and different purposes, such creditors having complied with the conditions upon which the appropriation was directed.

In the case of *Memphis v. United States*, 7 Otto, 293, it was held "that the relator had acquired a vested right by his judgment, and his alternative writ

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of *mandamus*, to have a tax levied sufficient to pay the debt due to him from the city; a right of which he could be deprived by no subsequent act of the Legislature." "We do not deny," the court adds, "that it is competent for a Legislature to repeal an act, which, when it was passed, was a mere gratuity, if while it was in existence, no vested rights have been acquired under it or by virtue of it."

The right which the relator had was conferred by the act of the Legislature of this State, passed in 1873. He obtained judgment, and pursuing his remedy, under said act, issued the alternative writ of *mandamus*, and the day after its issuance, the act of 1873 was repealed, and it was held that when the alternative *mandamus* was issued, a proceeding was commenced under and by virtue of the statute, and the repealing act was inoperative and void, so far as it undertook to take away the rights the relator had "in force of his judgment."

By the act of 1879, the chancery court, in which the general creditor's bill was directed to be filed against said delinquent tax-payers, was empowered to give all the relief, both to the defendants and to creditors, that might be given, if there were as many separate suits as there are creditors and delinquent tax-payers, and to enforce all liens upon property for the payment of such taxes, and to make all sales of property necessary to the collection of such taxes, and the simple filing of their claims by creditors attested by affidavit of the claimant, if not contested, it is declared by the act, shall entitle the same to payment *pro rata*.

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Appellants, under this act, accepting its offer, have filed and established their claims as required by the act, and this the act declares entitles them to have said claims paid *pro rata* out of the fund set apart for their benefit.

Under the provisions of said act of 1879, we think the appellants were vested with the right to have their claims satisfied as prescribed by said act, and that the acts of 1883 could not destroy or interfere with said rights.

At the last term of this court, in the unreported case of the *State v. Butler*, in an elaborate and carefully prepared opinion by Judge Cooper, this court declared the manner in which the creditors of the extinct municipality of Memphis were to be paid under the act of 1879, and although it was not expressly adjudicated, the questions in that case not requiring such adjudication, yet it seemed to be assumed, that the action of the Legislature, and of the creditors in conforming thereto, had settled the rights of the creditors and the delinquent tax-payers.

We are of opinion that the acts of 1883 are inoperative and invalid, so far as they purport to change or divest the rights of creditors acquired under the act of 1879, and the bill filed pursuant thereto, and that act must be held as binding upon the State, and a settlement of the questions embraced in it.

The chancellor's decree will be reversed, and the costs of this court will be paid by the receiver out of funds in his hands as such receiver.

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11L 498
12L 225

ROBERT M. PICKETT and THOS. A. RAYNER v. BLAND
P. BOYD, Adm'r of John D. Ware, deceased.

1. CONSTITUTIONAL LAW. *Retrospective law. Remedy.* Section 3485 of the Arkansas Code, providing that a judgment assessing damages against a principal in an injunction bond, shall be conclusive on the surety, embraces bonds executed before its enactment, and as to which, since it affects the remedy merely, it is constitutional.
2. JUDGMENT OF FOREIGN STATE. *Judge's certificate.* Under our Code, section 3795, the certificate that the clerk's attestation is in proper form, may be made by any judge, chief justice or presiding magistrate of the State, though he may not be a judge of the court wherein the judgment was rendered.
3. SUPREME COURT PRACTICE. *Objections to evidence must be special.* In order to put the court in error in the admission of testimony, the specific objection to it must be pointed out.
4. STATUTE OF LIMITATIONS. *Injunction bond.* The statute of limitation does not begin to run in favor of an administrator of a surety upon an injunction bond, until the injunction is dissolved.
5. JUDGMENT. *Collateral attack.* In a suit upon a judgment, the judgment cannot be attacked for mere irregularities.

FROM HAYWOOD.

Appeal from the Chancery Court at Brownsville.
H. J. LIVINGSTON, Ch.

BENJ. J. LEA and E. J. READ for complainants.

A. D. BRIGHT and B. P. BOYD for defendants.

COOKE, Sp. J., delivered the opinion of the Court.

In 1870 the respondent's intestate became the surety of one R. M. Balch, upon an injunction bond executed

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by him in the circuit court of Crittenden county, Arkansas, on the equity side of said court, for the purpose of restraining the sale of a tract of land, under a deed of trust executed by said Balch to secure a certain indebtedness to the complainants, in a cause instituted in said court by said Balch against one Howell and others. Said John D. Ware, the surety on said injunction bond, died in 1871 in Haywood county, Tennessee, intestate, and letters of administration upon his estate were granted to the respondent, Boyd, in 1872. The cause was finally determined in said circuit court in Arkansas, and the injunction dissolved in 1876, and the damages sustained by the complainants, by reason of the wrongful suing out of said injunction was then assessed, by the court, against the representatives of said Balch, who had died in the meantime, and the cause had been revived against them as such, and judgment rendered for the amount.

This bill was filed against the respondent as administrator of said Ware in 1877, to recover the amount of the damages so assessed against the principal in said injunction bond by the circuit court of Crittenden county, Arkansas, upon the final determination of said cause in 1876. Several questions have been made by the record, and insisted upon in argument, why the decree of the chancellor, who granted the relief sought by the bill, should be reversed.

Only such will be noticed, however, as are deemed material to a correct determination of the case.

By section 3482 of the Code of Arkansas, it is provided that "upon the dissolution, in whole or in part,

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of an injunction to stay proceedings upon a judgment or final order, the damages shall be assessed by the court, which may hear the evidence and decide in a summary way, or may, in its discretion, cause a jury to be empannelled to find the damages."

By section 3483, "where money is enjoined, the damages may be any rate of per cent on the amount released by the dissolution, which in the discretion of the court may be proper, not exceeding ten per cent."

And by section 3485, "judgment shall be rendered against the party who obtained the injunction, and the assessment shall be conclusive upon the surety of such party."

This latter provision did not exist until the adoption of the revised Code in 1874, and consequently was not in force at the date of the execution of the injunction bond, and it is objected that this provision cannot be applied to the bond in question. This position is not maintainable, because the statutory provision in question affects the remedy upon the bond alone and does not interfere with the right, and is not therefore retrospective in the sense of the constitutional prohibition: *Townsend v. Townsend*, Peck, 1; *Woodfin v. Hooper*, 4 Hum., 13, and numerous other cases cited; Meigs Digest, sec. 727, sub-sec. 23.

It is next objected that the transcript of the record and proceedings of said cause in which said judgment was rendered, is not certified as required by law.

The transcript is certified in due form by the clerk of the court in which the proceedings were had and the judgment rendered. The official character of the

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clerk, and that his attestation is in due form of law, is certified to by the judge of the county court of Crittenden county, Arkansas, whose official character, etc., is certified to by the clerk of the circuit court; and the objection now taken is that the requisite certificate cannot be made by any other judge except the judge of the court in which the record and proceedings were had, and such are the provisions of the act of Congress upon this subject: See Code of Tennessee, vol. 1, page 175.

But by the provisions of our Code, section 3795, it is enacted that "a judicial record of a sister State, or any of the Federal Courts of the United States, may be proved by a copy thereof attested by the clerk under his seal of office, if he has one, together with a certificate of a judge, chief justice, or presiding magistrate, that the attestation is in due form of law." The meaning of which would seem to be, that the certificate of any judge, chief justice, or presiding magistrate, that the attestation is in due form is sufficient. And if this view of the case be correct there can be no valid objection, as the certificates are in all other respects strictly in conformity to the requirements of both the act of Congress and the provisions of the Code above cited. And it has been determined by this court that certificates in conformity to the requirements of said section of the Code are sufficient, although not in accordance with the requirements of the act of Congress: 2 Heis., 309.

But if this is not so, and it is unnecessary here to determine the question, we think the objection taken

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to the certificate in the court below, was too general to be available to the respondent.

Said certified transcript was filed as an exhibit to the bill, and it was denied by the answer that it was certified as required by law, and on the trial in the chancery court, when the transcript was offered in evidence by the complainant, the respondent objected to it as evidence, as is shown by a bill of exceptions, because it was not certified as required by law; but neither by the answer nor by the exception was any specific defect or cause of objection, stated or reasons shown or pointed out, why the said certificates were not in conformity to the requirements of law. It has been too often decided by this court now to be questioned, that in order to put the court in error in the admission of testimony, the specific objection to it must be pointed out: *Campbell v. Campbell*, 3 Head, 327; *German v. German* 7 Cold., 180. Hence, we hold that the transcript of the record was properly admitted.

The statutes of limitation of two years and six months, and of three years and six months, were pleaded, and it is insisted that the action was barred by either one of these statutes, as Ware, the respondent's intestate, died in 1871, and letters of administration was granted to respondent in 1872, and the bill was not filed until 1877.

It is a sufficient answer to this that the suit in which the injunction was granted was not determined, nor the injunction dissolved until in 1876, and hence, the respondent's liability did not attach or the complainants right of action accrue until that time. The

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suit having been commenced within less than two years after the complainants right of action accrued, the statute could form no bar as it did not commence to run until the right of action had accrued: *Bradford v. McLemore*, 3 Yer., 318; *Trott v. West*, 9 Yer., 433.

It is next insisted that the suit here should have been upon the original injunction bond instead of the transcript of the record and proceedings in said circuit court. There is nothing in this objection. The injunction bond was a part of the record in that cause, and could not be reversed. A certified copy of it as well as the judgment and proceedings upon which it was rendered, is in the transcript, and well warrants the decree of the chancellor.

Various objections are urged to the regularity of the proceedings of that court. To all of which it is a sufficient answer to say, the judgment remains in full force and was unappealed from. Every presumption is in favor of its correctness, and it cannot be attacked for mere irregularities in this mode: *Freeman on Judgments*, sec. 565; 45 N. Y., 535; 6 Am. Rep., 132.

There is no error in the chancellor's decree, and it will be affirmed with costs.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF TENNESSEE,

11L 505
12L 520

FOR THE

EASTERN DIVISION,

KNOXVILLE, SEPTEMBER TERM, 1883.

W. A. DENTON *et al.* v. GIPSON WOODS' Administrator
and heirs.

BOND, APPEAL. *Costs. Surety.* A surety to a bond for damages and costs given as required by law upon appeal to this court by the defendant in a chancery case, is only liable for the costs incident to the appel, and not for the costs of the court below.

FROM COCKE.

Appeal from the Chancery Court at Newport. H.
C. SMITH, Ch.

G. W. PICKLE for complainants.

WM. MCFARLAND and W. J. MCSWEEEN for de-
fendants.

COOPER, J., delivered the opinion of the court.

At the hearing below a decree was rendered, upon

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a settlement of accounts, in favor of complainants against the defendant, James Woods, as administrator of Gipson Woods, deceased, for \$618.05 and the costs of the cause. From this decree he prayed an appeal, which was granted upon his giving bond with security in the sum of \$1,200, "for the prosecution of said appeal." The bond was given to prosecute the appeal with effect, or "to pay, satisfy and abide by the judgment of this court that may be rendered." The chancellor's decree was modified by this court at the present term so that the accounts of the parties were balanced, the complainants were ordered to pay the costs of this court, and the appellant as administrator the costs of the court below, including the costs incurred, upon a remand for the purpose, in supplying certain lost papers. The complainants now apply to charge the sureties of appeal with the costs adjudged against the appellant.

The recovery below having been upon open accounts, and against the appellant as administrator, the bond was too broad: *Gorric v. Henderson*, 5 Yer., 197; *Banks v. McDowell*, 1 Cold., 85. In such a case, the surety is liable to the extent of the obligation which the law imposes, within the terms of the bond, upon the principal as a condition of his appeal: *Terry v. Stakely*, 3 Yer., 506; *Sharpe v. Pickens*, 4 Cold., 268; *Nichols v. McCombs*, 2 Yer., 83. In the first of the cases thus cited, decided in 1832, and again in the second case cited, decided in 1867, the courts held that the liability would only be for the costs and damages incident to the appeal, and did not extend to the costs of the court below. In the first case, the appeal was

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by the complainant in a chancery suit from a decree dismissing his bill with costs. In the other, the appeal was by the defendant from a judgment against him at law. The same bond was then, and is yet required for the appeal at law and in equity, except in equity causes, where the decree is for a specific sum of money against a party in his own right, or where real estate is ordered to be sold: Code, secs. 3164, 3164 *a*. And the bond in this case should only have been for damages and costs: Code, sec. 3163. A surety in an equity cause even for costs undertakes with reference to the discretionary power of the court to award costs without regard to the result of the suit: *Allison v. Stephens*, 2 Head, 251; *Glaze v. Eason*, 2 Yer., 301. But the question would still be whether any costs can be adjudged upon an appeal bond except the costs incident to the appeal.

The liability of a surety, it was said in one of our cases, is limited by the terms of his bond. "Nothing can be added, otherwise men would be bound not by the contracts they have entered into, but what the court might presume they intended to enter into": *Nichol v. McCombs*, 2 Yer., 83. But in *Ogg v. Leivant*, 1 Heis., 40, the contrary was ruled. There the bond for the prosecution of a chancery suit was conditioned "to pay all costs and damages that might be decreed by the chancery court." The complainant successfully prosecuted the suit in the chancery court to a decree, which was reversed upon appeal by the defendant, and the bill dismissed with costs. And this court held that the costs of both the court below and of the ap-

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pellate court might be adjudged against the complainant and his surety. The decision was rested upon the provisions of the act of 1860, ch. 120 (Rev. Code, sec. 3196, a, b, c). The first section of this act is: "In all cases of bonds for the prosecution of original suits, or by appeal, *certiorari*, or writs of error, or where there is security taken of record in any of the courts of the State, or before a justice of the peace, the security shall undertake to pay all costs that may be at any time adjudged against his principal, in the event it is not paid by said principal." Section 3 is: "No omission or neglect to insert the proper condition in any such bonds shall vitiate or impair the validity of the same." The court thought that the effect of this act was to make all sureties mentioned therein liable for all costs which might be adjudged against their principal notwithstanding the terms of the bond, the law becoming a part of the contract. And this decision has been since followed.

If the question were *de novo*, I should be inclined to think that the statute, by its first section, merely intended to provide that in any of the cases specified the principal might be required to give a bond which would in terms cover all the costs accruing thereafter, which might at any time be adjudged against him, but that if a different bond was taken the surety could not be held liable beyond its terms. The third section merely re-enacts what had always been the law, that a failure to insert the proper condition would not affect the validity of the bond to the extent of its actual conditions. And the language of the learned judge who

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delivered the opinion of the court in *Deaton v. Mulvaney*, 1 Lea, 73, tends to the same conclusion.

Even in this view of the statute the language of the bond before us is broad enough to include "all costs that may be at any time adjudged against the principal," for the condition is "to pay the judgment of this court that may be rendered." If, therefore, the appellant might be required to give a bond to cover the costs of the court below, he may be held to have actually executed such a bond. But we are clearly of opinion that the "damages and costs" which an appellant to this court is required to give under the statute are only the costs and damages incident to the appeal. The law remains as it always has been, and the liability on the bond is for costs subsequently accruing.

Motion disallowed.

SKEET DYER v. THE STATE.

1. CRIMINAL LAW. *Plea in abatement.* The court may properly strike out, on motion, a plea in abatement to an indictment after the defendant has gone to trial on the merits alone, whether the plea was filed before or after the commencement of the trial.
2. SAME. *Same.* A plea in abatement to an indictment that the court was opened by the clerk, the judge being absent, and that the grand jury were attempted to be elected, empaneled and sworn by the Attorney-General, is bad.

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3. SAME. *Same. Quere*, whether such a plea, if sufficient in form, can be allowed where the record of the court states that the grand jury were properly elected, empaneled and sworn by the judge?

FROM GRAINGER.

Appeal in error from the Circuit Court of Grainger county. J. G. ROSE, J.

J. K. SHIELDS for Dyer.

ATTORNEY-GENERAL LEA for the State.

COOPER, J., delivered the opinion of the court.

At the December term, 1882, of the circuit court of Grainger county, the plaintiff in error was indicted for a misdemeanor. The record of the term shows that on the day fixed by law for holding the term, the court was opened by the regular judge, the other officers being present, that a *venire facias* was properly issued and returned, and that from the jurors summoned, the court "proceeded to as directed by the statutes in such case made and provided to select and empanel a grand jury, when were elected the following good and lawful men," naming them; "and the said grand jury, having been duly summoned, elected and empaneled, were sworn and charged by the court, and retired to consider if indictments," etc. The indictment was found, and returned into court on the next day by this jury. At the next term of the court, and on April 24, 1883, the plaintiff in error filed a plea in abatement, that the grand jury who found the indictment were not legally elected, empaneled and sworn;

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that the regular judge of the court was absent, and no regular judge present, and no attorney at law elected to preside; but that the court was opened by the clerk, "and the said grand jury attempted to be elected, empaneled, sworn and charged by the Attorney-General for the said judicial circuit (naming him), he having no authority in law to hold the court, preside therein, or organize the said grand jury." On the same day, the defendant was arraigned upon the indictment, and pleaded not guilty, whereupon a jury to try the issue joined was elected and sworn, and "respited from rendering their verdict" until the next day. Then follows in the transcript an entry as of the same date, that the parties appeared in open court, and the Attorney-General moved "to strike out the pleas filed by the defendant," and the court allowed the motion, to which defendant excepted. On the next day the jury rendered a verdict "that the defendant was guilty in manner and form as charged," and judgment was rendered accordingly. The defendant appealed in error.

The natural inference from the order of entries as they appear in the transcript would be, that the defendant first filed his plea in abatement, was then arraigned, pleaded not guilty, and went to trial on the issue joined in this plea, and that afterwards the plea in abatement was stricken out by the court upon the motion of the State.

In this view, the action of the circuit judge was correct. For all objection to the election and qualification of the grand jury is waived by a plea to the merits, and going to trial thereon, even if a plea in

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abatement has been filed but not acted on: *Epperson v. State*, 5 Lea, 291; 1 Bish. Crim. Prac., sec. 886. Neither the motion nor the entry of the action of the court shows the ground on which the State moved and the court decided. If the plea in abatement was filed after the commencement of trial, it was, for the same reason, properly stricken out. And the fact that the proceedings were on the same day would make no difference. For the term is only of one day, while the order of time may always be shown by the record, or by evidence not in conflict with the record, whenever the rights of litigants require.

If the filing of the plea, and the action of the court in striking it out both preceded the plea of not guilty, then the question of the sufficiency of the plea would arise. Such pleas, as this court has always held, must possess the highest degree of certainty known to the law in every particular. They must exclude, by proper allegations, every legal intendment or conclusion that might otherwise have been made against them: *State v. Wills*, 11 Hum., 222; *State v. Bryant*, 10 Yer., 527; *State v. Deason*, 6 Baxt., 511. The plea does aver broadly that the grand jurors were not legally elected, empaneled and sworn, which is only the averment of a conclusion, not of facts from which the court may draw its own conclusion: *Daniel v. State*, 3 Heis., 257; *State v. Jackson*, 3 Leg. Rep., 301. But the draftsman undertakes to state the facts on which he intends that his general averment shall be considered as resting. These facts are that the regular judge was absent at the beginning of the

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term, and the court was opened by the clerk; that while there was no judge present, "the grand jury was *attempted* to be elected, empaneled, sworn and charged" by the Attorney-General. The language may mean that the Attorney-General, after the clerk had opened the court and before any qualified judge had taken the bench, *attempted* to empanel the jury, that is, went through the forms, perhaps in jest, used in such cases. In this view, the plea was clearly insufficient, for it does not necessarily negative the selection of the jury properly when the judge did take the bench.

If, indeed, the grand jury were elected, empaneled and sworn by the Attorney-General, and not by the presiding judge, the proceeding was clearly illegal.

Persons deprived thereby of one of the safe-guards thrown about them by the laws ought, it would seem, to have some remedy. The record of the court shows, however, that the grand jury were properly elected, empaneled and sworn. The defendant, by his plea, seeks to impeach the verity of the record. If the defendant may do this, because there is no other remedy open to him, by plea in abatement, he ought, by his plea to negative every reasonable intendment in favor of the record. He ought, therefore, to have averred that the grand jury were not in fact elected, empaneled, and sworn at all by the presiding judge, and that the minutes of the court were fraudulently made up in their present form contrary to the truth. In this view also, the plea is wanting in the required certainty, and was properly stricken out.

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By statute it is made the duty of every judge in this State to attend and hold his courts at the time prescribed by law: Code, sec. 4220. Minutes of the proceedings of the court are required to be kept by the clerk: Code, sec. 4040, sub-sec. 4. And these minutes are to be read in open court every morning, and signed by the judge: Code, sec. 4101. These minutes are thus made the highest evidence of what is done in the court, and, so far as they are records of judicial proceedings, import absolute verity, and are conclusive unless attacked for fraud: *Conway v. Brown*, 5 Heis., 237; *Smith v. State*, 9 Hum., 10. A plea alleging matter contrary to the record is bad: 1 Bi-h. Cr. Pr., secs. 885, 1346. And the record may therefore be looked to in passing upon the sufficiency of a plea, for it would be useless to allow it when the only evidence admissible upon issue taken would be the record itself: *State v. Collins*, 6 Baxt., 151; *Turk v. State*, 7 Ohio, 240.

In England, indictments found by inferior tribunals were taken up to the King's Bench by *certiorari*, accompanied by a caption which was a historical statement by the clerk of the inferior court of the selection of the jury, and finding of the indictment: *McClure v. State*, 1 Yer., 206, 216; *State v. Long*, 1 Hum., 386. Under this system a plea lay to the qualification of the grand jury. We have followed the English law without noticing the effect, if any, of a change of system: *Bennet v. State*, M. & Y., 133; *State v. Duncan*, 7 Yer., 271; *State v. Baker*, 4 Hum., 12; *State v. Deason*, 6 Baxt., 511. The actual de-

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cisions, it is believed, have been where a juror was averred to be deficient in some prescribed qualification, disqualified by relationship to the prosecutor or the party, or not in fact selected as a juror, averments not necessarily contrary to any positive finding of the record. The usual recital that the jurors are "good and lawful men," is rather the statement of a conclusion than of a fact, and the qualification of the jurors is not in reality tried. But the grand jury is required to be, and is elected, empaneled and sworn by the court, and an averment otherwise is necessarily contrary to the record. There may be some doubt, therefore, whether the plea before us falls within the principle of our decisions. But it is not now necessary to decide the point.

Affirm the judgment.

J. E. STORY v. J. H. WALKER.

EXEMPTION. *Mechanic's tools. Photographers.* A photographer is not a mechanic within the meaning of the statute which exempts from execution in the hands of each mechanic, etc., one set of mechanic's tools.

FROM GRAINGER.

Appeal in error from the Circuit Court of Grainger county. J. G. ROSE, J.

Story v. Walker.

JOHN K. SHIELDS and J. L. ROGERS for Story.

G. W. PICKLE for Walker.

COOPER, J., delivered the opinion of the court.

By statute: "There is also exempt from execution, in the hands of each mechanic in the State who is engaged in the pursuit of his trade or occupation, one set of mechanic's tools, such as are usual and necessary to the pursuit of his trade." Walker having recovered a judgment against Story, who was a photographer, caused an execution thereon to be levied on a set of photographer's instruments and outfit, the property of Story, consisting of a photographic tent, and the usual tools and instruments used by an artist or photographer in taking pictures, such as bins, camera box, camera stand, head-rest, bath holder, etc., worth less than fifty dollars in all. The parties made up an agreed case in writing, setting out the foregoing facts, and submitted the same to the circuit court. The circuit judge held that the articles levied on were not exempt from execution under the statute, and Story appealed from his judgment. The Referees have reported in favor of an affirmance.

The Legislature of this State has not treated photographers as mechanics, but as photographic artists, and subjected their avocation to a privilege tax: Rev. Code, sec. 553 *a*, sub-sec. 29, and subsequent statutes. The exemption act first above quoted exempted also "to each mechanic, who is the head of a family, fifty dollars worth of lumber or material." The amount

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of this exemption has since been increased to two hundred dollars worth of lumber or material, "or products of his labor, either in a finished or unfinished state": Act of 1879, ch. 59. The words of the statutes of exemptions were used, and intended to be understood in their usual and popular sense. A mechanic, engaged in the pursuit of his trade, is a workman employed in shaping and uniting materials, such as wood, metal, etc., into some kind of structure, machine, or other object, requiring the use of tools. The tools must be such as are used by the workman to shape or change the surface of lumber or other material, or create an object by manual labor: Freeman on Ex., sec. 226. The photographer is an artist, not an artisan, who takes impressions or likenesses of things and persons on prepared plates or surfaces. He is no more a mechanic than the painter who, by means of his pigments, covers his canvas with the glaring images of natural objects. And his tent, bins, camera stand camera box, head-rest, bath holder, etc., are no more tools, within the meaning of the exemption laws, than the tent, stool, easel, hand-rest, brushes, pigment box, and paints, glaze, etc., of the painter. The exemption was not intended to extend to these artists, and their tools of trade.

The judgment of the circuit court must be affirmed. The costs below should have been divided under the Code, section 3453. But the record does not show any objection to the judgment rendered, under these circumstances, we think that the entire costs of the cause should now be equally divided between the parties.

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11L 518
16L 577

11L 518
110 163

NANCY SHARPE v. GREENE ALLEN *et al.*

1. CHANCERY PLEADINGS AND PRACTICE. *Dismissal of suit out of term.*
By statute a suit in chancery may be dismissed in writing out of term as well as in term, and the dismissal, when established by proof, with or without contest, will relate back to, and be operative from the day of its execution.
2. SAME. *Attorney's lien.* Neither the attorney of the party who dismisses a suit, nor third persons although parties to the suit, are entitled to resist the dismissal, but if the attorney or third person has previously acquired, either by decree or lien, an interest in the subject-matter of litigation which the law recognizes, that interest will not be affected by the dismissal, and may be asserted by proper proceedings.
3. SAME. *Same.* By a bill filed to recover a distributive share of the estate of a decedent against devisees upon the ground that the decedent died intestate as to the part of the estate sued for, without attachment or other impounding process, the property sued for is not placed in *custodia legis*, and the counsel of the claimant acquires no lien until declared on the recovery.
4. SAME. *Appeal does not lie. When.* An appeal does not lie from an order overruling a plea as insufficient.

FROM COCKE.

Appeal from the Chancery Court at Newport. H.
C. SMITH, Ch.

H. H. INGERSOLL and J. P. EVANS for petitioners.

WM. MCFARLAND, W. S. DICKSON and G. W.
PICKLE for defendants.

COOPER, J., delivered the opinion of the court.

About the month of January, 1876, G. W. Allen

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died in Cocke county without wife or child, leaving as his heirs and distributees at law one brother, four sisters, and the children of one deceased brother and of two deceased sisters. G. W. Allen left a last will which was duly proved and recorded after his death, and of which his surviving brother was appointed and qualified as executor. The only devises and bequests of the will were made to this brother and two of the sisters. Nancy Sharpe, the original complainant in this case, was one of the sisters of the testator not provided for by the will. She filed her bill against the executor and devisees claiming that the will only disposed of a part of the testator's property, and seeking to hold them liable for the residue of the property which they had taken possession of under the will. The other heirs and distributees were made defendants to the bill, the children of the deceased brother and sisters by describing them as the children of the brother or sister named, whose names and residences were unknown. The devisees of the will demurred to the bill upon the ground, in substance, that the will devised to them all the property of which the testator died seized and possessed. The chancellor overruled the demurrer, and this court, upon appeal, affirmed his decree, and remanded the cause for further proceedings. The decision was put upon the ground that the will of G. W. Allen only disposed of the property which the testator owned at the date of its execution, and that the deceased died intestate as to after acquired property. The opinion of this court is reported in *Sharpe v. Allen*, 5 Lea, 81.

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Shortly after the remand, and on January 28, 1881, the complainant, Nancy Sharpe, entered into a compromise agreement with the devisees under the will of G. W. Allen, of all the matters of litigation between them growing out of the provisions of the will and relating to the testator's estate. And, in accordance with the terms of compromise, she gave to the devisees a written instrument of that date stating the facts, and reciting that, in consideration of the compromise, she dismissed her pending suit, and released the devisees from all right of action against them in reference to the will or the estate of G. W. Allen. On February 28, 1881, which was the first day of the next term of the chancery court in which her suit was pending, the devisees presented this writing to the court and moved to dismiss the suit. On the same day, the children of Margaret Nichols, deceased, who was a sister of G. W. Allen, entered their appearance in the suit, and filed an answer and cross bill, in which they admitted the facts alleged in the original bill, and asked for the same relief. On the next day, the devisees introduced proof of the execution by the complainant of the instrument of dismissal and release. On the second day, O. C. King, the counsel of the complainant, in the filing and prosecution of her bill, filed his petition in the cause, claiming a lien on the property in litigation for his professional services, and resisting the dismissal of the bill upon this ground. On the next day, March 3, 1881, the cause was heard upon the motion of the devisees to dismiss the bill by virtue of the compromise and written order

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of the complainant, which motion was opposed by O. C. King and the children of Margaret Nichols. The cause was also heard at the same time upon the motion of the devisees to dismiss the petition of O. C. King because it did not show that he had the lien claimed. The chancellor overruled both motions. The devisees then entered their appearance to the petition and cross-bill, and were allowed time to make defense. They afterwards demurred to the petition and cross-bill, and their demurrers were overruled. They then filed a plea to the cross-bill, which was set for hearing on its sufficiency, and held by the chancellor to be insufficient. The action of the chancellor upon the demurrers and the plea is embodied in one entry, which recites the filing of the plea after the demurrer to the cross-bill had been overruled. "From which decree," says the entry, the devisees pray an appeal, which is granted upon their giving bond with security, and the same was accordingly executed. The bond in the record recites the filing of the demurrers and the plea in bar, and the action of the court thereon, and appeal as above. The Referees have reported in favor of the affirmance of the chancellor's decree.

It was held at an early day, in this State, that the consent of the court was necessary to the dismissal of a suit in equity, and therefore no dismissal could be had in vacation: *Stewart v. Hall*, 2 Tenn., 179. Afterwards, by the act of 1826, ch. 28, brought forward into the Code, sec. 3199, suits were authorized to be dismissed in writing out of term time as well as in term. By virtue of this statute, a dismissal of

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a suit in vacation puts an end to the suit, and terminates the control of the court over it as fully as if made in term time. The jurisdiction of the court over the cause ceases except to render judgment for costs, or to make such orders as may be necessary to give effect to the dismissal: *Thompson v. Thompson*, 3 Head, 527. The validity of the order may, of course, be contested and determined: *Stanton v. Houston*, 12 Heis., 265. But if genuine and fair, neither the attorney of the party nor third person, although parties to the suit, can resist a dismissal: *Yoakley v. Hawley*, 5 Lea, 670; *Stephens v. Railroad*, 10 Lea, 448; *Johnson v. Story*, 1 Lea, 114; *Clement v. State*, 1 Leg. Rep., 261. If the attorney or third person has previously acquired an interest in the subject-matter of the litigation, that interest cannot be affected by the dismissal, and may be asserted by proper judicial proceedings. This is the principle upon which the decision of *Pleasants v. Kortrecht*, 5 Heis., 694, is rested, although it is very doubtful whether the principle was properly applied to the facts of that case.

The compromise and consequent dismissal in writing by the complainant of her suit in the case before us were made on January 28, 1881, and took effect from that date. It was of no consequence to the rights of the parties to this contest whether the proof of its execution was made on the first or second day of the ensuing term of court, or before or after the filing of the lawyer's petition and the cross-bill of the defendants. When established by proof, with or without contest, the dismissal in writing would relate back to,

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and be operative from the day of its execution. It was the duty of the court, as soon as the proof was made, to make the necessary orders to carry the dismissal into effect so far as the complainant was concerned. If other persons had rights in the subject-matter of litigation or in the suit, which the law would recognize, they might be enforced, and would not be affected by the dismissal.

The children of Margaret Nichols do claim that by virtue of the decision of this court construing the will of G. W. Allen, they have acquired an interest in the property in controversy as to which the deceased died intestate, and that they are entitled to prosecute the suit for their benefit. The facts do raise the question whether the decree of this court overruling the demurrer to the bill, under the circumstances, the appeal having been taken for the purpose of having the will construed and the remand having been made with direction to the court below to proceed in accordance with the opinion of this court, is not such a decree or decretal order as will entitle any of the defendant distributees to enforce it. Another question in favor of these parties is also raised, and that is whether the court would not treat the cross bill as an original bill for the enforcement of their independent rights. The authorities on this subject are cited in the last edition of Dan. Ch. Pr. But the case is not properly before us for the determination of these questions. The devisees did not appeal from the decree overruling their demurrer to the cross-bill, as they might have done by statute with the permission

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of the chancellor. They filed a plea to the cross-bill, and have appealed from the decree holding that plea insufficient. Such a decree is, of course, not a final decree from which an appeal lies for the defendants had the right to answer the allegations of the bill in a given time: Code, sec. 4395. Nor is it such a decree as can be appealed from by consent of the chancellor: Code, sec. 3157. The appeal from this part of the chancellor's decree must be dismissed as improvidently granted, at the cost of the appellants.

The appeal from the decree overruling the demurrer of the appellants to the petition of King, the attorney, is within the statute. The petition, conceding upon its face that Nancy Sharpe had entered into the compromise, and executed the written dismissal in question, and stating the facts, rests its equity upon the assertions that by the bill and the proceedings themselves, the estate of G. W. Allen was in *custodia legis*, and that petitioner had acquired a lien on the share of his client in the estate for the payment of his fees. The demurrer of the devisees squarely calls in question the correctness of these assumptions. The bill does not seek to attach any property, nor does it impound the property by injunction, or other process. Nothing has been brought actually in *custodia legis*. And the lien of an attorney for professional services in such a case has no existence until declared upon the final recovery. The counsel has fairly earned, and is justly entitled to compensation for services from his client. But he has acquired no lien on any property which can be enforced against the appellants.

Railroad v. Burnett's Executors.

The chancellor's decree must be reversed in this branch of the case, the demurrer to the petition sustained, and the petition dismissed as to the appellants, with costs.

11L 525
4pi 512

EAST TENNESSEE, VIRGINIA & GEORGIA RAILROAD
COMPANY v. BURNETT'S EXECUTORS.

RAILROADS. *Condemnation of land. Interest. Pleadings and practice.* Where petition was filed under section 1326, *et seq.*, of the Code, to have damages assessed to plaintiff by reason of the road passing over petitioner's land, and after years of delay in litigation, commissioners or a jury were appointed by the circuit court to assess damages, no directions being given as to interest, the jury fixed the damages and made their report, which was excepted to because no interest was allowed. *Held*, the case was not tried as a jury case, but the court acted on the report and the facts therein stated as in equity, and the action of the court does not have the effect of the finding of a jury, and that interest might be allowed.

FROM COCKE.

Appeal in error from the Circuit Court of Cooke county. J. G. ROSE, J.

W. M. BAXTER and GEO. BROWN for Railroad.

WM. MCFARLAND and G. W. PICKLE for Executors.

Railroad v. Burnett's Executors.

FREEMAN, J., delivered the opinion of the court.

At a former day of this term, this case was affirmed from the bench by the court, with the modification sustaining exception of Burnett's executors, allowing interest on the amount recovered as damages from the period thus fixed, to-wit, from the time Burnett ceased to be compensated for interest by the use of a free pass on the road.

A petition for modification of the judgment then rendered is presented, as to the question of interest alone. It is urged, that inasmuch as the circuit judge did not allow interest, his finding is like the finding of a jury on this question, or the finding of the court in a case submitted without a jury, in which the finding of the jury or court, in a matter of discretion would not be controlled.

This is certainly the rule in the cases indicated, where the case is tried according to the common law.

Was this such a case? The facts are, that a petition, under sections 1326, *et seq.*, was filed to have damages assessed to plaintiff by reason of the road passing over petitioner's land, after a number of years of delay in litigation, the case having been brought to this court and remanded, commissioners or a jury was appointed by the court to assess said damages.

In the decree appointing the jury, there are specific directions given as to the rules of law governing them in such cases, but the question of interest on the damages is not mentioned at all, but pretermitted. The jury having no directions on the subject, fixed the

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damages and made their report. This report was excepted to by petitioner, because interest was not allowed, and the exception overruled. Defendant appealed, and petitioner prosecutes a writ of error to reverse the holding as to interest.

The case was not tried as a jury case, but in the form it stands before us in the record, is in the nature of a proceeding in equity, with exceptions to the report of a master. The court simply acted on the report of the commissioners, and on the facts therein shown, in overruling the exceptions. There had been no appeal as provided for by sections 1342 and 1343, in which case a jury trial is to be had, or such a trial, and reinvestigation of the facts on testimony adduced by the parties before the court as in other cases, a jury being waived. On this state of the case we hold the action of his Honor does not have the effect of a finding by a jury, and is subjected to revision as in other cases of exceptions to the report of a master. We think this a proper case where interest should be allowed; certainly there is nothing shown in the record that forbids such an allowance.

We therefore hold the former judgment of this court correct, and dismiss the petition.

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JAMES HODGE v. THE STATE.

CRIMINAL LAW. *Cruelty to animals.* A person has the right to protect his premises against the depredations of mischievous dogs, and for that purpose to use such means as are reasonably necessary, and if the depredating animal is thereby caught in a steel-trap and mutilated, it would not be *needless* torture or mutilation under the statute.

FROM KNOX.

Appeal in error from the Criminal Court of Knox county. M. L. HALL, J.

J. C. J. WILLIAMS for Hodge.

ATTORNEY-GENERAL LEA for the State.

COOKE, Sp. J., delivered the opinion of the court.

The plaintiff in error was indicted and convicted under the act of 1881, ch. 169, enacted for the prevention of cruelty to animals.

The first section of said act is as follows: "If any person shall overdrive, overload, torture, torment, deprive of necessary sustenance, or cruelly beat, or needlessly mutilate, or kill, or cause or procure to be overdriven, overloaded, tortured, tormented, or deprived of necessary sustenance, or to be cruelly beaten, or needlessly mutilated or killed, as aforesaid, any living creature, every such offender shall, for every such offense, be guilty of a misdemeanor." And by the

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13th section of said act, the words "torture, torment or cruelty shall be held to include every act, omission or neglect whereby *unjustifiable* physical pain, suffering or death is caused or permitted, * * but nothing in this act shall be construed as prohibiting the shooting of birds for human food."

The indictment charged in substance that the defendant unlawfully and needlessly mutilated a dog, the property of one Garner, by setting a steel-trap in a bucket of slop, and exposing the same, whereby said dog was caught in said trap by the tongue, which was torn out, and great pain and torture unlawfully and needlessly inflicted upon said animal.

The proof showed that the defendant had been for some time annoyed by a dog, or some other animal, invading his premises at night, and breaking up the nests of his hens, sucking the eggs, disturbing his poultry, etc. That he suspected a dog that belonged to his father as being the depredator, but that he had no suspicions against this dog of the prosecutor, who lived about a quarter of a mile distant from him. That these depredations continuing, he borrowed a steel-trap, and set it in a bucket of slop, placed it in his garden, and tied the trap with a cord to a post of the fence. That he did so expecting to catch the dog belonging to his father. That during the night the prosecutor's dog was caught in the trap by the tongue, which, or a part of it, was torn out, and was found lying by the trap. That the dog is mutilated thereby, and unable to eat without great waste of his food, cannot bark as formerly, is very poor,

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and very much injured; and that he was a very valuable dog. So says the prosecutor.

The testimony further showed that this valuable dog was in the habit of running about at night, and invading and depredating upon the premises of persons living in the neighborhood. That he had been repeatedly seen at night around the houses and upon the premises of persons living at the distance of a mile or more from the prosecutor, and that he raised disturbances on their premises by fighting the dogs belonging to them.

He was a large dog, and one witness states that he shot at him or towards him one night for the purpose of scaring him away. Another witness states that upon one night when he saw this dog about his premises, a turkey-hen which he had setting had her nest broken up, and the eggs were gone next morning. The testimony fully showed that this dog had a bad character for prowling about through the neighborhood at night.

His Honor, the trial judge, after instructing the jury that "tearing out the tongue of an animal needlessly, that is, without *necessity*, or unnecessarily causing it to be done, would amount to such torture and needless mutilation of the animal as are prohibited by the statute," further instructed them that "if a party set a trap or other instrument, though it may be to take some particular dog or other animal, and so bait it as to be likely to lure and draw other dogs or animals into danger of the trap, and some other dog or animal should thereby be lured or drawn, and be

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injured by the trap or other instrument, these are circumstances that the jury may look to in connection with all the evidence in the case to determine whether the injury to the animal was needlessly caused or not. We do not think this was a sufficiently full or correct exposition of the law as applicable to the facts disclosed by this record. The testimony showed that the premises of the defendant had been nightly invaded for a considerable length of time, his poultry disturbed, and their nests destroyed by some animal he supposed to be a dog, and that for the purpose of capturing it he set the trap in the manner above stated in his own garden, upon his own premises. There can be no doubt, we think, that in doing so his object was, by catching the animal, to protect his property and relieve his premises from these depredations, and not for the purpose of inflicting needless torture upon the animal. There was no testimony going to show that the slop used by the defendant was such as was calculated or likely to lure dogs or other animals away from the premises where they belonged on to his premises or within his enclosures. That this dog was the animal that had been making these nightly incursions and depredations upon these premises can scarcely admit of a doubt. The defendant had a right to protect his premises against such invasions, and to adopt such means as were necessary for that purpose. And if a night-prowling dog, in the habit of invading premises and breaking up hen's nests, and sucking the eggs, while so transgressing is caught in a steel-trap, though set by the owner for

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that purpose, and thus suffers pain or mutilation, we are not prepared to say that it would be *needless* torture or mutilation within the meaning of the statute. A literal construction of this act would seem to indicate that no one is permitted to kill or wound any living creature, however noxious, even a blackbird or a crow, or a skunk or a serpent, unless under some necessity, without being guilty of a penal offense. We do not understand such to be the meaning of this act. Whilst its object was to prevent cruelty to animals, and was intended as a humane provision for their protection, it was not intended to deprive a man of the right to protect himself, his premises and property, against the intrusions of worthless, mischievous or vicious animals by such means as are reasonably necessary for that purpose. The object of the statute was to protect animals from willful or wanton abuse, neglect, or cruel treatment, and not from the incidental pain or suffering that may be casually or incidentally inflicted by the use of lawful means of protection against them.

The defendant had the right to protect his premises against the depredations of mischievous dogs, and to use such means as were reasonably necessary for that purpose, and if the dog of the prosecutor, the identity of which was unknown to the defendant, was in the habit of committing these depredations, he had a right, if it was necessary to prevent them, to set a steel-trap for the purpose of capturing him, and if, while committing these nightly depredations, not being allowed upon the premises, by a bait, it was thus

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caught and mutilated, it would not be *needless* torture or mutilation within the meaning of this statute, and the jury should have been so instructed. Upon the facts of this case, as they appear in the record, even upon a full and correct charge, we would not be satisfied to permit this conviction to stand.

The judgment of the court below will be reversed and a new trial granted.

11L 533
14L 145

TROTTLINGER v. EAST TENNESSEE, VIRGINIA & GEORGIA
RAILROAD COMPANY.

1. RAILROADS. *Schedule regulations.* A railroad has the right to make reasonable regulations for running its trains, and if a purchaser of a ticket has notice of same, or the railroad company had given such publicity to same in the ticket office, and by posters in the cars, that a person of ordinary intelligence, by the use of reasonable care and caution, would or might obtain all requisite information, then he is bound by the regulations.
2. SAME. *Waiver by railroad company of rights under schedule.* The railroad company did not waive its rights under such regulations by the conductor punching and taking up the ticket after having told the holder that the train did not stop at his place of destination, the ticket holder being on a train which, according to the schedule, did not stop there.
3. SAME. *Waiver.* There can be no waiver unless so intended by one party and so understood by the other, or one party has so acted as to mislead the other.

Statement of case. The plaintiff purchased a ticket at reduced rates from agent of defendant at W to go to N and return, signing a contract endorsed on the ticket to make a continuous journey each way. By the regular schedule for several months the mail trains at night did,

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not stop at W; the plaintiff resided near W, and was frequently there, but testified he did not know said mail train did not stop there, and had seen notices and posters in the depot, but had not read them. On his return trip he got on said mail train at C and came to K, where a new conductor took charge of the train, to whom plaintiff presented his ticket, when said conductor told him the train did not stop at W, and he could not put him off there. Plaintiff requested a check to get off at M, which was refused. The conductor punched and took up the ticket. The train did not stop at W but went on to R some miles beyond, the conductor exacting regular fare beyond W. *Held*, the plaintiff was not entitled to recover.

FROM GRAINGER.

Appeal in error from the Circuit Court of Grainger county. J. G. ROSE, J.

J. P. EVANS for Trotlinger.

W. M. BAXTER and J. K. SHIELDS for Railroad.

FREEMAN, J., delivered the opinion of the court.

On May 6, 1880, plaintiff purchased a ticket from the agent of defendant at Whitesburg, East Tennessee, to go to Nashville, Tennessee, and return, the purpose being to attend the "Exposition" at the latter place.

An agreement, as part of the contract on the ticket, contained the following stipulations: "In consideration of the reduced rate at which this ticket is sold, I agree to the following restrictions and conditions. That I will make a continuous journey, going directly through to destination without stopping over at any intermediate point longer than the schedule requires." On return trip the stipulations are: "I will commence the return journey on the date of the agent's stamp on return

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coupons, and go directly through to destination without stopping at any intermediate point longer than the schedule requires; the ticket to be void if not used before May 30, 1880, and void if conditions not complied with." Signed by plaintiff and general ticket agent.

It appears that by a published schedule, announced to the public in the form of a printed notice fastened up in depots, or railroad offices, as well as in the cars of the company, the company's schedule for running its trains, showed that the mail trains at night did not stop at Whitesburg. This was the regular schedule, and had been since August, 1879. Plaintiff resided one mile from Whitesburg at date of purchase of ticket, and had probably done so for some time before, but only half mile from the track of the road, in sight of it, as he says. He was frequently in Whitesburg, but says he did not know the mail train did not stop there, had seen notices and posters in depot, but had never read them.

There was at the time, by the regular schedule, a train of the company going east—a mixed train—with passenger cars attached, which did stop at Whitesburg.

On plaintiff's return trip he got on defendant's cars at Chattanooga, came on to Knoxville on the mail train. At Knoxville a new conductor took charge of the train. When he went through the cars for tickets plaintiff presented his ticket, and the conductor told him the train he was on did not stop at Whitesburg, and he could not put him off there. Plaintiff requested a check to get off at Morristown, but the conductor re-

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fused. He however punched and took up his ticket. The train did not stop at Whitesburg, but went on to Rogersville junction, some miles beyond, taking plaintiff, the conductor exacting the regular fare for the additional transportation.

This suit is brought to recover damages for failure to put plaintiff off at Whitesburg, and for trouble and inconvenience resulting from being put off at the point further on from his regular stopping place.

The general rules of law governing the case were stated by his Honor, as to the right of the company to make reasonable regulations for running its trains. He held that the ticket purchased was subject to these regulations, and they made part of the contract, provided defendant had notice of such schedule regulations, or such publicity had been given them in the ticket office of the company and by posters in the cars (as was done in this case), that a party of ordinary intelligence, by the use of reasonable care and caution, would or might obtain all requisite information as to the matters involved, then he was bound by these regulations: See Wait's Act. and Def., vol. 2, p. 67, and cases cited.

In view of these principles, his Honor charged the jury that the company was not bound to transport the party under this ticket, on the mail train, the schedule of which did not provide for stopping at Whitesburg. In this he was clearly right, as under the facts here found the passenger has no right to demand a change of the schedule of the company in his favor, nor was such a thing involved in the contract made for his

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transportation; on the contrary, by its fair meaning, taken in consideration with the circumstance, such a view was of necessity excluded.

The case, however, went off below as well as before the Referees, on the charge of his Honor, as to a waiver by the company on this point, by the action of the conductor in taking up and punching the ticket of plaintiff, under the facts shown in the testimony on this subject.

His Honor said, on this question, that it was competent for the company to waive the implied condition of requiring the party to conform to its schedule regulation, and if defendant, through its conductor, punched and took up the ticket and permitted the plaintiff to have passage to Whitesburg on that ticket, it was the duty of defendant to stop its train and land the plaintiff at that place. So he held, that while the company was not bound to transport the party on this train, yet if the defendant, by its conductor, undertook and did transport him, it was bound to stop and put him off. On this point in the charge the jury have found their verdict, and on the approval of this proposition as applicable to the facts of the case, the Referees have based their report of affirmance.

The jury understood, it is evident, and might well have understood his Honor to mean, that under the facts shown, if the conductor failed to put plaintiff off the train, when he called for his ticket, but permitted him to remain until he arrived at the regular stopping station beyond Whitesburg, then this amounted to a waiver, and bound the company to stop at Whitesburg.

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But in this his Honor overlooked an essential part of the case, and that is, that the conductor expressly told plaintiff that the train did not stop at Whitesburg, and that he could not put him off there. He has treated this as unimportant on the question of waiver, and made it turn entirely on the fact of carrying the party on, or rather, not putting him off the train.

Without discussing the question of the power of the conductor to waive the implications of the contract, it is clear there could be no waiver unless it was so intended by one party and so understood by the other; or else one party has so acted as to lead the other to believe he intended to waive his right, and the other party has been misled by it. This last, on the principle of estoppel, in such a case, always involving an element of fraud or bad faith.

But here the conductor expressly, as we have said, refused to consent to put him off at Whitesburg, telling him the train did not stop there. It was the duty of plaintiff then, if he did not wish to go on under this state of facts, to demand that he be put off where he was or at the first station, he having gone on the train innocently. If he continued on the train, he did so under the implied understanding, with fair notice of facts to him, that he was transported subject to the schedule of the company as to the point of stoppage. This is the only fair meaning of what was done.

His Honor holding the opposite to this was in error, as well as the Commission of Referees, for which the judgment must be reversed and the case remanded for a new trial.

Lengar and Wife v. Hazlewood.

LEE LENGAR and WIFE v. DANIEL HAZLEWOOD *et al.*

AND

B. F. CAMPBELL *et al.* v. LEE LENGAR and WIFE *et al.*

STATUTE OF LIMITATIONS. Where heirs recognize claims as subsisting debts against their ancestor's estate, and the deed of trust by which same are secured as an encumbrance, and induced parties to take the debts up by agreeing that they were valid liens, the heirs cannot rely upon statute of limitations as to same.

FROM CLAIBORNE.

Appeal from the Chancery Court at Tazewell. H. C. SMITH, Ch.

J. L. ROGERS for complainants.

F. M. FULKERSON for defendants.

COOKE, Sp. J., delivered the opinion of the court.

This was a bill filed by Lengar and wife, who is one of the heirs at law of Peter Hazlewood, deceased, against the other heirs of the decedent, to have partition of a certain tract of land of which it is alleged he died seized and possessed. The complainants in the cross-bill, B. F. Campbell and Barney Campbell, became parties respondent by intervention and filed their answer as a cross-bill, or in the nature of a cross-bill, by which they alleged that said Peter Hazlewood in his lifetime had conveyed said land in trust to one Theo. Ragan, to secure certain specified debts which

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had been transferred to them, and that they were the beneficiaries in said deed of trust, and seeking to have the trust executed and the land sold for the satisfaction of their debts. Lengar and wife, and B. F. Hazlewood and Lucy Thomas answered the cross-bill, and resisted the relief sought by it upon the ground, that as they alleged, the ancestor, Peter Hazlewood, had paid off said debts and satisfied said deed of trust in his lifetime. The other respondents made no defense and suffered judgment *pro confesso* to be taken against them.

The respondents to the cross-bill subsequently obtained leave and amended their answer so as to plead and rely upon the statute of limitations of two years and six months, and three years and six months, one of them being a non-resident, and of six years, and all other statutes they say that can afford them any protection. A considerable amount of proof was taken, which is conflicting and not altogether satisfactory.

The chancellor dismissed the original bill and granted the relief sought by the cross-bill. Lengar and wife alone appealed.

The Referees have filed a report by which they say they have been unable to reconcile the testimony, and have had no little difficulty to determine the right, but as the chancellor found in favor of the complainants in the cross-bill, they cannot say that he was wrong in so doing; that they do not think the statutes of limitations can or do effect the case under the facts disclosed by the proof; they therefore recommend an affirmance of the chancellor's decree.

Exceptions have been filed to this report, because

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as is stated, the burden of proof is the other way, and because the Commissioners have reported that said claims are not bound by the statutes of limitations.

While we are not very well satisfied as to the reliability of the testimony, yet we think the weight of it sustains the conclusions of the chancellor, and shows that the debts set up by the cross-bill were not paid by the ancestor in his lifetime; and that complainants in the original bill, who are the only parties that have appealed from the chancellor's decree, not only recognized these claims as subsisting debts, and the deed of trust as an encumbrance upon the land after the death of Peter Hazlewood, the ancestor, but actually induced the complainants in the cross-bill, who were nephews of Mrs. Lengar, to take them up, by agreeing that they were valid liens upon the land, and that the complainants should have that portion of the land which they now seek to sell for partition, in satisfaction of the same. We do not think that the appellants, if the statute of limitations were otherwise applicable, should be permitted to rely upon it under the facts disclosed by this record. In this view, it is unnecessary to determine what would be the effect of their plea under a different state of the case.

We think the justice of the case has been most likely reached by the chancellor's decree, and are satisfied to affirm it with costs.

Wallace v. The State.

WILLIAM WALLACE v. THE STATE.

1. CRIMINAL LAW. *Obtaining goods by false pretense.* Where S had W's note for \$150 and agreed with him if he would purchase land of N, he would credit his note for that amount, and W purchased the land at \$130, but represented to S that N had raised the price to \$150, and S agreed to take it at that price if W could not get it for less. N conveyed the land as S directed and S gave up the note to W. *Held*, though a gross fraud, not a false pretense in the legal sense.
2. SAME. *Indictment. Variance.* Where the indictment alleged the note was executed by W to S, and the evidence showed it was executed to S's daughter, and by her assigned to S. *Held*, this was a fatal variance.
3. SAME. *Same. Evidence.* In such case it is not necessary to object to the evidence, as it was a case where the averments in the indictment were not sustained.

FROM CLAIBORNE.

Appeal in error from the Circuit Court of Claiborne county. J. G. ROSE, J.

J. L. ROGERS and W. S. CARR for Wallace.

ATTORNEY-GENERAL Lea for the State.

DEADERICK, C. J., delivered the opinion of the court.

Plaintiff in error was convicted of obtaining goods by false pretense, and sentenced to three years confinement in the penitentiary. A new trial was refused and he has appealed in error to this court.

The false pretense charged in the indictment consisted in unlawfully, fraudulently and feloniously obtain-

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ing a certain promissory note, the property of Esquire Sullivan, which note was executed and owed by said Wallace to said Sullivan. Sullivan requested Wallace to buy for him (Sullivan) a certain tract of land from one Woodson Noe, and agreed to take the land at such price as Noe would sell the same at to said Wallace, in satisfaction *pro tanto* of Wallace's note of \$150 to said Sullivan. Wallace bought the land of Noe, at \$130, and represented to Sullivan that he had given Noe \$150 for the land, whereupon Sullivan surrendered to Wallace his note of \$150 and had a deed made for the land to his daughter.

The above are substantially the facts stated in more formal language in the indictment. The facts proved on the trial are, that Sullivan had Wallace's note for \$150, and Sullivan agreed with him if he would purchase the land of Noe for \$130 he would credit his note with that amount. Wallace did purchase the land at \$130, but represented to Sullivan that he had paid \$150 for it, and Sullivan agreed to take it at that price. Wallace agreed beforehand to let him have the land at the price which he paid for it. Wallace told him Noe had raised his price to \$150. Sullivan agreed to give that, but told Wallace to get it for as much less as he could.

Wallace deceived Sullivan as to the price he paid for the land, and made false representations to him in respect to his purchase.

The land was conveyed by Noe to Sullivan's daughter at his request, and he surrendered the note of \$150 to Wallace. It was a fraud and falsehood for Wal-

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lace to represent he had paid \$150 for the land, but it is not every fraud and falsehood that constitute a false pretense in its legal signification. Sullivan knew the land as well as Wallace did, and agreed to give \$150 for it, and authorized Wallace to give that sum if he could not get it for less. He got the title to the land for which he contracted, and paid only the price he agreed to pay. He was deceived only as to the price Wallace had given for the property, but not as to the ownership, the title or the value of it. It was not, therefore, a false pretense in its legal sense.

This view disposes of the case, and it is scarcely necessary to add the judgment would also have to be reversed, because of the variance in the description of the note, the subject of the alleged false and fraudulent pretense, and the evidence upon this point.

It is alleged in the indictment, that the note procured by Wallace by the false pretense, was *executed* by him to Esquire Sullivan, while the evidence shows it was *executed* to his daughter, Jane, and by her assigned to her father. It is essential that the description of the note should be proved as averred in the indictment. It is the property which it is alleged was obtained by false pretenses. In the analagous case of larceny, the property stolen must be proved as laid in the indictment: 1 Greenl. Ev., sec. 65. See also W. on Crim. Law, sec. 886.

It is not necessary to object to the evidence. It is a case of failure to sustain by evidence the averments of the indictments, which must be proved.

Let the judgment be reversed.

Cox v. Patton.

COX v. PATTON.

PLEADINGS AND PRACTICE. *Slander. Appeal. Forma pauperis.* The plaintiff in an action for slander, cannot prosecute appeal *in forma pauperis*.

FROM WASHINGTON.

Appeal in error from the Circuit Court of Washington county. NEWTON HACKER, J.

I. E. REEVES for Cox.

S. J. KIRKPATRICK for Patton.

FREEMAN, J. delivered the opinion of the court.

This is an action of slander, in which plaintiff had a verdict for fifteen dollars in the court below. He was dissatisfied with the amount of recovery, we suppose, and has prosecuted an appeal in error *in forma pauperis* to this court. A motion is made to dismiss the appeal, because no bond is given, and that a party plaintiff is not authorized to prosecute an appeal to this court *in forma pauperis*.

It has always been held that in a suit for any of the excepted causes of action found in section 3192 of the Code, security must be given for prosecution of the suit. The language of that section is: "Except for false imprisonment, malicious prosecution and slanderous words, any person may *commence* an action without giving se-

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curity, by taking the prescribed oath." This language taken literally would only exempt the party from giving security at commencement of the action, and require it for any subsequent stages of the proceeding. It has been extended by construction to appeals. But we see no reason to extend it to cases where the statute excepts the character of action from its operation at the commencement of the suit. We therefore hold this is but a stage of the proceeding in an action of slander, and in this action, at all stages, security is required of the plaintiff.

The motion to dismiss will be allowed.

STATE v. JOHN CORDELL.

CRIMINAL LAW. *County Judge.* An indictment will not lie against county judge for failure to make *semi-annual* report to county court under third section of an act passed March 7, 1879, ch. 76.

FROM SCOTT.

Appeal from the Circuit Court of Scott county. D.
K. YOUNG, J.

ATTORNEY-GENERAL LEA for the State.

L. A. GRATZ for Cordell.

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FREEMAN, J., delivered the opinion of the court.

This is an indictment containing three counts, which, on motion, was quashed by the circuit judge, and the State has appealed.

The first count charges Cordell with failing, on the — day of January, 1882, as county judge of Scott county, to make his *semi*-annual report to the county court, showing all money received and paid out by him, and a complete statement of the financial condition of the county, as required by the 3d section of the act of the General Assembly, passed March 7, 1879.

The second count is substantially the same, and the third is in general terms for failing to settle his accounts as county judge, as required by the above act.

This act of 1879 is entitled “An act requiring judges and chairmen of county courts to execute *bonds* for the faithful discharge of their duties as accounting officers and financial agents of their counties.” This is all of the title.

The first section is in precise accord with the title, and requires the officers named, hereafter, before entering upon the discharge of their duties, to enter into bond, etc., conditioned for the faithful discharge of their duties as accounting officers and general agents of their counties, during their official terms, as set forth in the Code, section 421, and sub-sections thereof.

The second section requires this to be done at the April term, 1879, of the quarterly courts, and then

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provides if any of these officers shall fail to do so, the clerk of the court where such default occurs shall notify him to appear at the July quarterly court, 1879, and give the bond, and in case of failure, the court is to declare the office vacant, and fill it.

But a third section is added: "That judges and chairmen of the county courts in this State shall make written *semi annual* reports to the county courts, showing all moneys received and paid out, and a full and complete statement of the financial condition of the county, and said reports shall be entered on the minutes of the court, and said judges and chairmen shall settle their accounts once each year; and it shall be the duty of the justices of the peace of each county to appoint a committee to settle with said officers, and a failure of said officers, or any one of them, to comply with this act, his office shall be declared vacant, and subject to all other penalties prescribed in this act," which we suppose means, that the county court shall proceed to fill the vacancy as provided by section 2 of the act, as we see no other penalties prescribed.

It is insisted in brief of defendant that failure to settle, as required, is not made an indictable offense, but only that the office is by the court required to be declared vacant, and the vacancy filled, therefore no indictment will lie—on the principle that the expression of one thing is the exclusion of another—that defining one penalty excludes the idea that another and different might, or was intended, to attach to the same act—that is, a cumulative penalty—the

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one prescribed definitely, and the other resulting by implication, and this was not intended, and cannot be inflicted.

We are of the opinion this contention is correct, and content ourselves with affirming the judgment of the court below on this ground, without discussing the other question presented in the brief.

Affirm the judgment.

M. J. HUFFMAN v. HUGHLETT & PYATT.

1. PLEADINGS AND PRACTICE. *Bill of exceptions.* If the circuit judge, in a case tried by him without a jury, find the facts established by the evidence, and embody them in a bill of exceptions without objection by the parties, the objection cannot be taken that the bill of exceptions does not contain all the evidence.
2. SAME. *Tort feasons. Waiver.* The commencement of an action by the injured party against one of a series of tort feasons, upon the implied promise arising from the conversion of personalty, will not be a waiver of his rights against the other tort feasons.
3. SAME. *Conversion.* If the circuit judge, who tries a case without a jury, finds that one of two defendants converted the personalty in controversy, and sold it to the other defendant without authority of the plaintiff, the owners, the findings of fact will warrant the conclusion by him that the latter defendant had also converted the property.

FROM SCOTT.

Appeal in error from the Circuit Court of Scott county. D. K. YOUNG, J.

HENDERSON & JOUROLMON for Huffman.

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W. P. WASHBURNE and L. A. GRATZ for Hughlett & Pyatt.

COOPER, J., delivered the opinion of the court.

On March 12, 1881, Hughlett & Pyatt sued out an original attachment against the estate of H. P. Springer, a non-resident of the State, the affidavit for the writ stating that Springer was indebted to them in the sum of seventy dollars "due by account for black walnut lumber that the said H. P. Springer wrongfully took from them, and converted to his own use." The attachment was issued and levied, and publication made requiring the said Springer to appear on April 21, 1881, before the justice who issued the writ, for a hearing. On April 21, 1881, Hughlett & Pyatt, upon an affidavit that Springer was either the partner or agent of M. J. Huffman, sued out a summons against H. P. Springer and M. J. Huffman to answer them in an action of debt in a sum under \$100. This summons was issued by the same justice of the peace, executed upon Huffman, and made returnable before the justice on the same day. The plaintiffs appealed from the judgment rendered by the justice. In the circuit court, the case was tried by the judge without a jury, who rendered a judgment in favor of the plaintiffs against both of the defendants for the value of the lumber sued for. Huffman alone appealed.

The bill of exceptions shows that after the papers in the case were read, the plaintiffs and the defendant Huffman introduced oral proof showing the following facts, viz: "Plaintiffs were, as partners, the owners of

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three walnut logs in New river containing 2,000 feet, and worth seventy dollars. These logs floated down the river to Russell's mill, and were then taken and converted by the defendant Springer, and sawed into lumber, and afterwards sold by him to the defendant without authority from plaintiffs, and the facts were so found by the court. The court adjudges that these facts constituted a trover and conversion of said property by each of said defendants, and that both of them were liable to plaintiffs for the value thereof by reason of said facts; and that plaintiffs, having waived the tort, and sued defendants for the value of said lumber were entitled to the same."

The Referees have reported in favor of an affirmance of the judgment below upon the ground that the bill of exceptions does not show that it contains all the evidence. The settled rule of this court undoubtedly is that where there is a general verdict by a jury and judgment thereon, on a similar finding by the court, without a jury, and judgment, if the bill of exceptions fails to show that it contains all the evidence, the court will presume that there was sufficient evidence to sustain the verdict. But this rule would, of course, not apply where there was a special verdict of the facts found by the jury, to which the court is asked to apply the law. The reason is that the evidence has accomplished its object when the facts intended to be established is found by the tribunal to whom that duty is entrusted by law. The same reason is equally applicable to a finding of the facts by the court, when the court is entrusted by law with that

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duty. And the parties might themselves agree upon the facts proved in lieu of the evidence at large. If the testimony is of such a character as, under the rule of this court, to make the finding of a general verdict by court or jury conclusive, it is always sufficient to say that testimony was introduced by the plaintiffs tending to prove certain facts, and testimony by the defendant tending to prove certain facts. The Supreme Court of the United States, which does not revise the discretion of the lower court in refusing a new trial, has repeatedly condemned the plan of setting out the evidence at large, and insisted upon the adoption of the plan last mentioned, if a shorter statement of facts is not made or agreed upon. It is very much to be desired that the lawyers over the State would resort to the shorter mode suggested, and especially to the mode adopted in this case.

The suit was commenced by foreign attachment against Springer alone for the value of the lumber in controversy, based upon the implied assumpsit arising from the wrongful conversion of the property by the defendant. The suit was converted into a joint action against Springer and Huffman by a summons based upon the same implied promise. The affidavit upon which the plaintiff was permitted to make Huffman a party assumes the ground that Springer was his agent or partner. This affidavit, although in the record, is no part of it, not being incorporated in any bill of exceptions. The trial judge finds that in an action against the defendants, based on the facts of the case, as all of our civil actions are now under the Code,

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for the value of property wrongfully converted, Springer took and converted the logs of plaintiffs, sawed them into lumber, and sold the lumber to Huffman without authority of the plaintiffs, and that both defendants are liable to the plaintiffs for the value of the property. It is now insisted for the defendant Huffman; that the suing out of the original attachment against Springer was a waiver of the tort in the original taking, the result of which was to turn Springer into a purchaser of the chattels, and to validate the sale by him to Huffman.

The argument in support of the position thus taken is rested partly on the decisions of this court which give to the action on the implied promise arising from a conversion of personalty all the incidents of any other action *ex contractu*, and partly on the holdings of the court, as to the effect of the waiver of a tort on the rights of action of the injured party. But the fact that a suit in a particular form of action must have all the incidents attached by law to that form of action, can have no necessary bearing on the effect of the form of action on the rights or remedies of the plaintiffs. And the holdings of the court on the effect of the waiver of a tort, which have been cited, only go to this extent that if the aggrieved party after a technical conversion resume possession of the property as owner, or otherwise assents to the tortious taking, the remedy in trover is gone: *Trayner v. Johnson*, 1 Head, 51; *Bell v. Cummings*, 3 Sneed, 275; 2 Greenl. Ev., sec. 642, note 3. He may still sue in case for the tort which he might have treated

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as a conversion, or in assumpsit upon the implied promise: *Scruggs v. Davis*, 5 Sneed, 262; *Railroad v. Henderson*, 1 Lea, 1. If the action be in contract, it is not strictly a waiver of the tort, for the tort is the very foundation of the action, but, as Nicholson, C. J., has more accurately expressed it, a waiver of the "damages for the conversion," and a suing for the value of the property: *Kirkman v. Philips*, 7 Heis., 222, 224. It is simply an election between remedies for an act done, leaving the rights of the injured party against the wrong-doers unimpaired until he has obtained legal satisfaction. If it were otherwise, the suing of any one of a series of tort feasons, even the last, on the implied promise, where there was clearly no contract, would give him a good title and release all the others. No authority has been produced sustaining such a conclusion, and we are not inclined to make one.

The trial judge finds that Springer was guilty of a conversion of the property. Of course, he could communicate no title to a third person, even if he were a *bona fide* purchaser for value and without notice. Even in such a case the right to recover the property, if in existence, or its value if disposed of by the purchaser would be clear: *Price v. Jones*, 3 Head, 85. Whether a demand and refusal are necessary to establish a conversion in such cases is left in some obscurity by the authorities. They are only evidence of a conversion, and are unnecessary where there is other evidence of the conversion: *Houston v. Dyche*, Meigs, 76. The tendency of our decisions is to limit the

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requirement to cases where the possession was rightfully acquired, and dispense with it where the act of taking possession was itself a conversion: *Merchants National Bank v. Trenholm*, 12 Heis., 520. The trial judge in this case does not find that Huffman was a *bona fide* purchaser without notice. He finds that the property was sold to him by the first wrong-doer without authority from the plaintiffs. The dominion or control thus acquired would necessarily be in his own right, and adverse to the right of the true owner. And the facts would warrant the conclusion reached by the trial court. The findings are not in the nature of a special verdict to which the court is to apply the law, but facts from which the judge, acting as a jury, might draw the necessary conclusions for a general verdict.

Affirm the judgment.

11L 555
2pi 610

11L 555
117 319

JOHN W. HANKS *et al.* v, G. W. FOLSOM *et al.*

1. SALE OF LAND. *Conveyance.* An instrument in the usual form of a deed, by which one person purports, for a recited consideration, to have "bargained and sold" to another a specified tract of land, "to have and to hold" to the latter as "an inheritance in fee simple forever," will convey the land to the grantee in fee.
2. SAME. *Assurance of title. Married woman.* A deed of conveyance of land in fee executed by a married woman alone, without any privy examination, is an assurance of title purporting to convey an estate in fee which will perfect the title of an adverse holder of land under the Code, sec. 2763.

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3. SAME. *Husband and wife. Limitations.* The disseizin occasioned by the possession of the grantee of such a deed would be a disseizin of the joint estate of husband and wife, and their joint right of action would be barred in seven years, and the title of the husband not only barred but extinguished, and the heirs of the wife, if she died before the husband, would have only three years after her death and the extinguishment of the husband's right within which to bring suit for the recovery of the land.
4. SAME. *Same. Estoppel. Quere,* whether the married woman would be estopped to recover the land by representing herself as unmarried, or her children by accepting the consideration paid, and not offering to return it.

FROM HAMBLEN.

Appeal from the Chancery Court at Morristown. H.
C. SMITH, Ch.

SHIELDS & SHIELDS for complainants.

J. P. EVANS for defendants.

COOPER, J., delivered the opinion of the court.

Bill filed February 19, 1880, by the children and sons-in-law of J. A. Cassidy, who is still living, and Martha A. M. Cassidy, his late wife, to recover the possession of certain land. The chancellor, upon final hearing, declared the complainants entitled to the land upon the death of their father. The Referees have reported in favor of reversing the chancellor's decree, and dismissing the bill with costs. Both sides have filed exceptions to the report, so as to open the whole case.

J. A. and Martha A. M. Cassidy intermarried in 1858, and had five children, four of whom are com-

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plainants, and one of them a defendant to the bill. They lived in Grainger, now Hamblen county. He left his wife and family in 1865, and went to Ohio. He wrote two or three letters to his wife shortly after his departure, and then ceased to write altogether. The wife thereupon addressed a letter to the firm by whom she understood from him he had been employed, and in due course of mail received a reply, purporting to be from the firm, that a dead body had been found in the Ohio river, which was supposed to be that of her husband from certain papers taken from a pocket of the clothing. These papers, consisting of her husband's discharge from the army, seem to have been sent to her. This was early in 1866, and from that time she, and her family and neighbors, believed that he was dead. She was thereafter treated as a widow, and he was not again heard of in the neighborhood until about the middle of the year 1876. She and her children by Cassidy were left in abject poverty. At her instance, her only son by a former marriage, came from a distant county and took charge of her and her children.

About the time the land in controversy, which Martha A. M. Cassidy had inherited from her father in 1858, was set apart to her. It consisted of twenty-five acres of unenclosed and unimproved land. In order to secure a home for her family, she exchanged this land for another small tract in the neighborhood which was improved. In pursuance of the agreement of exchange, on July 16, 1869, she undertook to convey the land in controversy to the defendant, F. W. Tay-

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lor, and Taylor caused to be conveyed to her the other tract of land. She took possession of the latter tract, and lived on it with her children until her death on November 7, 1870. In the year 1872, her son by her first husband filed a petition in court against the other children for a sale of the land for partition, and such proceedings were had that in January, 1873, the land was sold, and the title vested in the son by the first marriage, who afterwards sold the land to the defendant, Crouch, and at his request conveyed it to Crouch's wife.

Upon the conveyance to him of the land in controversy, F. W. Taylor placed his son-in-law, the defendant, G. W. Folsom, in possession, who fully enclosed it by the first of December of that year, and remained in possession until November 29, 1876, when he sold to the defendant, McFarland, executing to him a bond for title. McFarland at once entered into possession, and has continued in possession ever since.

On January 29, 1880, J. A. Cassidy filed his bill against Crouch and wife to recover possession as tenant by the curtesy, of the land received by his late wife in exchange for the land in controversy. On January 20, 1880, Cassidy in writing surrendered his estate by curtesy in the land in controversy to his children, and on February 19, 1880, the present bill was filed.

The defendants having relied upon the defense of the statute of limitations of seven years, the complainants contend that the instrument in writing by which Martha A. M. Cassidy undertook to convey the land in

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controversy to F. M. Taylor, did not accomplish that object for want of necessary words of conveyance, and is in any event a mere nullity, because there was no privy examination of the grantor to its execution.

The material parts of the instrument are as follows: "This indenture, made and entered into the 16th day of July, 1869, between Martha Ann Matilda Cassidy of the one part, and Franklin W. Taylor of the second part, witnesseth, that I, the said Martha Ann Matilda Cassidy, have this day, for and in consideration of the sum of \$700, bargained and sold to the said Franklin W. Taylor, a certain piece or parcel of land (describing it), to have and to hold the said tract or parcel of land to the said F. M. Taylor as an inheritance in fee simple forever.

The objection to this instrument is that it contains no words of conveyance, and that the defect is not helped by the *habendum* clause, which, it is said, can only be looked to in order to define, qualify or control the estate conveyed. The operative words in the premises of this instrument are "bargained and sold." More than half a century ago, Chancellor Kent, in lectures which have done honor to our country, did not hesitate to say that a deed would be perfectly competent to convey land in any part of the United States, in which one person undertook, for a recited consideration, to "bargain and sell" to another a lot of land, describing it. And the highest court of at least one of our sister States seems to have judicially held such to be a deed good: 2 Dana (Ky.), 23. In this State, for over thirty years, it has been provided by

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statute that every grant by deed of real estate shall pass all of the estate of the grantor "unless the intent to pass a less estate or interest shall appear by express terms, or be necessarily implied in the terms of the instrument": Code, sec. 2006. And the Legislature, by the Code, sec. 2013, has reduced the forms of conveyance to their simplest elements, and disclosed a clear intent that the largest meaning shall be given to words in grant, unless limited by the instrument itself: *Daly v. Willis*, 5 Lea, 104. And our decisions have been, in effect, that the whole instrument will be looked to, without much reference to technical rules, to ascertain the intent of the parties. The same words may be construed as an agreement to convey, or as operating an actual conveyance according to the intention of the parties to be gathered from the context: *Beecher v. Hicks*, 7 Lea, 211; *Carnes v. Apperson*, 2 Sneed, 562; *Topp v. White*, 12 Heis., 165, 173; *Alderson v. Clears*, 7 Heis., 667; *Lafferty v. Whitesides*, 1 Swan, 123. It is impossible to read the instrument under consideration without seeing that it was intended as a deed of conveyance of the land in fee, and the word "sell" in the present, or "sold" in the past tense, equally import an executed contract unless limited by the context or character of the instrument. We are clearly of opinion that the words used in the instrument under consideration were sufficient, in view of the plain intent of the parties, to convey the land to the grantee in fee.

This court has uniformly ruled since the act of 1819, and has repeated the ruling at this term, that

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the meaning of the statute of limitations in favor of the tenant in possession does not depend upon the validity of the assurance of title under which he claims. If it be in form an assurance of title purporting to convey an estate in fee, although void both at law and in equity, the statute will perfect the title within the period of limitations. Continuous adverse possession is the important point, the assurance of title being necessary to ascertain the land, and to determine the estate acquired: *Hunter v. O'Neal*, 4 Baxt., 494; *Thurston v. University*, 4 Lea, 513. The point is made that the deed of a married woman is not rendered effectual by signing and delivery, but only by her privy examination. And, therefore, says the learned counsel, the question we make is not that the deed was void and inoperative merely, but that it was no deed at all. The distinction is a nice one, and perhaps we may be reasonably excused if we fail to see it. But the very point now relied on was made over a quarter of a century ago in a case involving the construction of the act of the Legislature passed to cure defective probates after a registration of twenty years, and found one judge of this court who thought it well taken. A majority of the court held, however, that there was no distinction between the deed of a *feme covert* and any other deed with a defective probate, although it was conceded the title did not pass for the want of a proper privy examination: *Matthewson v. Spencer*, 3 Sneed, 513. This decision has been repeatedly followed: *Murdock v. Leeth*, 10 Heis., 166; *Anderson v. Bewley*, 11 Heis., 36—VOL. 11.

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29; *Stephenson v. Walker*, 8 Baxt., 289. For a much stronger reason the ruling should be applied in a class of cases strictly analogous, where time is supplemented by continuous adverse possession for the required period.

The disseizin occasioned by the possession taken under the deed of Martha A. M. Cassidy was of the joint estate of Cassidy and wife, and their joint right of action was barred by the continuous adverse possession of Taylor for seven years, and the title thus acquired was sold to McFarland: *Guin v. Anderson*, 8 Hum., 298. And the heir of the wife has only three years after her death, or at any rate after the right of the surviving husband is barred. *Id.* The right and title of the husband was not only barred, but extinguished, and interposed no obstacle to a suit by his children: *McClung v. Sneed*, 3 Head, 219. His subsequent conveyance or surrender to his children passed nothing to them. And their right of action as heirs of their mother was also barred and extinguished by a failure to sue in the prescribed time.

It is probable also that the conclusion of the Referee may be sustained upon the doctrine of estoppel, as assumed by them, if not upon the implied fraud of the married woman in representing herself as *discover*t, at any rate, upon the ground that the complainants, although infants and *feme covert*, have ratified the act of the mother by accepting the property given in exchange, and not offering to return the property given in their bill: *Stormer v. Ditwaller*, MS. opinion at Knoxville, September term, 1878. It

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would be manifestly inequitable to give them both tracts of land, and it is not easy to see how they can do equity after having sold, even through proceedings in court, the tract received by them. It is, however, unnecessary to further consider this point.

The chancellor's decree will be reversed, and the bill dismissed with costs.

NORTON v. AILOR, Administrator.

1. HUSBAND AND WIFE. *Support of children.* If a man marry a woman with infant children, and he take them into his family, and treat them as part of his family, the law implies an obligation on his part to support them.
2. SAME. After the death or majority of one of such children, without promise to pay, the step-father can not recover from its guardian for its support and maintenance during its minority.

FROM UNION.

Appeal from the Chancery Court at Maynardsville.
W. B. STALEY, Ch.

A. S. PROSSER for complainant.

WASHBURNE & TEMPLETON for defendant.

FREEMAN, J., delivered the opinion of the court.

Reuben Huchison died in the Federal army in 1863, leaving a wife and four children, the youngest named

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Parley, the intestate of present defendant. She died February, 1882, having become an imbecile when about six years old, some years after the marriage of the mother with complainant, which took place in 1866.

The father left a small tract of land worth from \$300 to \$500, and a small amount of personalty. On the marriage, complainant moved to this place on which the wife resided, took charge of the family, this child included, and so they lived, until the death of Parley, the youngest. In October, 1882, this bill was filed to recover from her administrator compensation for his services in taking care of this child of his wife. The chancellor dismissed the bill, which has been recommended for affirmance by the Commission, and exceptions filed.

The exceptions put in issue the propriety of the chancellor's decree, based on the whole record, and therefore need not be specifically stated.

The bill charges that Sharp, a former guardian, had promised to pay for taking care of his ward. This guardian was removed in 1878, having been appointed in 1871. Defendant was then appointed in his place, and so continued until her death. It is also charged that respondent promised to pay reasonable board for the ward, but had only paid \$175. \$100 per annum is claimed in the bill as due complainant, less the \$175 paid.

The answer of respondent sworn to in response to the bill, denies that the former guardian had promised as charged, and calls for proof, and with the same explicitness denies that he ever promised to pay any

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sum further than the \$175 paid. He further pleads statute of limitations of six years as to all sums due before that period.

There is no admission of liability as argued in the answer, but a definite denial. There is no proof of any such contracts or promises as charged, and so the case stands on the facts, dependent on the question, whether the law raises a liability under the circumstances of the case.

It is certain the complainant married the mother, being poor himself, owning only a horse probably, at the time. That the mother having a home, belonging to herself and children, was living on the same at the marriage, and complainant went on the farm and remained. The mother had the four children, including Parley. She became insane some years after the marriage. Complainant kept the children in his family as his own, and treated them as such. The insane child was treated precisely as a child of his own would have been treated, in all probability, had such a child become unfortunate as she did.

Her guardian received money for her from the United States government, but no charge was made for board, nor any demand of payment, from 1871 to 1878, after that period, when respondent had been appointed as guardian, it seems some such claim was made, and under it \$175 paid, which he says was all he ever promised to pay, and we can but conclude, all the other party demanded or expected to receive. After the death of the child, his views we suspect changed, and hence this suit.

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The law governing this case is thus stated by this court in *Maguinay v. Saudek*, 5 Sneed, 147-8, "The husband is not bound by law to maintain a child of the wife by a former husband. But, if he receives such child into his own house, he is then considered as standing in *loco parentis*, and is responsible for the maintenance and education of the child so long during its minority as it lives with him, for by so doing, he holds the child out to the world as part of his family." It is added: "This is precisely the obligation of the father as respects the support of his minor child."

The same principle is laid down in Wait's Actions and Defenses, vol. 5, page 51, where it is said: "The law as now understood, holds him liable only when he takes such children into his own family and keeps them as part thereof." See cases cited.

This is precisely the case we have in this record. It cannot be held, that while he had thus taken upon himself the legal obligation to support these children, that at the same time there was also a right on his part, with no promise to that effect executed from any one, to pay for it, that he at the same time acquired the right to demand to be reimbursed out of the estate of the child. This would be to impose a legal duty, and at the same time release the party practically from it, by requiring repayment of any expense incurred in its performance.

While it is conceded, as argued by counsel, that the performance of this duty may be a good consideration for a promise on the part of the child after

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it arrives at years of maturity, this excludes the idea of such liability before such promise, if such liability existed, there would be no need for the after promise. The cases referred to, 2 Mass., 415, and 4 Mass., 675, as we understand them, do not decide the contrary.

It is also well settled law, that if a father is not able to support and educate his children in a manner suitable to their fortune or expectation, an allowance will be made by a court of chancery out of the infant's estate for those purposes: See Wait's Actions and Defenses, vol. 5, page 52.

We have not that case before us. On the contrary, the case is a claim made after the death of the ward, and fifteen years after the service commenced, and is specifically put on the ground of a contract and agreement on the part of the guardian to pay; no application to have the fund in the hands of the ward appropriated to expenses was ever made in her lifetime except for the \$175, and that paid, no more claimed or promised.

Under these circumstances, we think the chancellor was correct in dismissing the bill, and Referees correct in their report, and the same will be affirmed with costs.

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11L 568
13L 8
14L 219

NANCY LANE v. W. H. FARMER *et al.*

1. LIMITATIONS. *Husband and Wife. Survivorship. Guardian.* Upon the marriage of a female ward the guardianship ceases, and the husband is at once vested with the right to demand, sue for, and receive any funds in the hands of the guardian, or any choses in action of the wife, and the period required to create the bar of the statute of limitations, or to raise the presumption of payment would begin to run from that time. And if the wife afterwards take the right of action by survivorship, or divorce, she would take them in the condition in which he had left them.
2. GUARDIAN AND WARD. *Resulting trust. Husband and Wife.* If the late guardian of a female ward and of other wards, several years after the marriage of such female ward and after he had settled with the other wards, cause execution to issue on a judgment recovered by him as guardian before the marriage, and purchase land sold under it, the presumption would be that he acted under a claim of right and for himself, and if any resulting or constructive trust would arise from the fact that the husband and wife had funds in their hands of the guardian or an interest in the judgment, the trust would be in favor of the husband, and, if he elected to follow the fund into the land, it would be a reduction of the fund or chose in action into possession.
3. CHANCERY PLEADINGS AND PRACTICE. *Stale demands.* There is no intendment in favor of stale demands, and a clear case must be made by the claimant in order to secure the aid of a court of equity.
4. SAME. *How a bill may be dismissed.* The court may dismiss a bill *mero motu* when it contains no equity.

FROM CLAIBORNE.

Appeal from the Chancery Court at Tazewell. H.
C. SMITH, Ch.

J. L. ROGERS for complainant.

M. L. CARR and F. M. FULKERSON for defendants.

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COOPER, J., delivered the opinion of the court.

The original bill in this case was filed on the 29th of March, 1882, and the amended bill in November of that year. The case is before us on demurrer to the bills, and the rights of the complainant turn upon the facts disclosed by the bills. But the record is so badly written by an unskilled, and unintelligent scribe, that it is almost impossible to ascertain the facts with absolute certainty.

On September 14, 1858, S. J. Barnard, as guardian of the five children of his deceased brother, George Barnard, of whom the complainant was one, recovered a judgment in the circuit court of Claiborne county, against Benjamin Cloud and John Devault for \$2,494 and costs of suit. In the year 1867, Barnard caused an execution to be issued on this judgment, and levied upon two tracts of land as the property of John Devault. On August 12, 1867, both of these tracts were sold under the levy and bought by Barnard, as guardian, one of them at \$1,000, the other at \$1,500 or \$500, the record stating the amount both ways. On October 21, 1868, Barnard assigned in writing his bid, and interest in the lands thus acquired to his wife, Nancy Barnard, the assignment having been found in the county court clerk's office after the filing of the original bill. So far as complainant knows, Barnard never took a sheriff's deed for the land, and the bill avers the transfer to the wife was fraudulent as to complainant, and that the wife never had possession of the land. Shortly after the date of his assignment, Bar-

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nard left the State with his family, and died several years ago insolvent. His widow and heirs were made defendants, as non residents, by publication. In December, 1869, John Devault conveyed one of the tracts of land, the one on which he resided, to his son, daughter and son-in-law by deed for a recited consideration of \$1,000 paid to him or for him on his liabilities. This deed was duly registered on December 15, 1869. The bill charges that the conveyance was intended to defraud creditors, that John Devault continued in possession of the land until his death in 1882, and his heirs and personal representatives are made defendants. In the year 1869, Evans & Thomas, as creditors of S. J. Barnard, filed an attachment bill against him as a non-resident of the State, and attached the other tract of land as his property, to subject it to the payment of their debt. Such proceedings were had in the cause that a decree was rendered in favor of Evans & Thomas, the land sold thereunder, and bought by Thomas for \$409.02. The sale was confirmed, and all the title and interest of Barnard and Devault therein divested out of them, and vested in Thomas in fee. In January, 1872, Thomas sold and conveyed the land by quit-claim deed to Hugh Farmer, who died in 1877 testate, and his devisees are made defendants. The bill charges that Evans & Thomas had personal knowledge that the land was bought by Barnard as guardian, and that the attachment proceedings were void for certain specified defects.

After the recovery of the judgment against Devault in 1858, and before the sale of his lands thereunder,

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two of George Barnard's children died intestate, without wife or child. The complainant, Nancy, intermarried in 1859 with James Lane. The original bill was filed in the name of the husband and wife, with an allegation that he had deserted her for about two years, the wife using the husband's name for her benefit under the Code, section 2805. Before the filing of the amended bill, the complainant had obtained a divorce from her husband, and she filed that bill in her own name alone. The complainant says that after the recovery by Barnard of the judgment against Devault and before the sale of the land, he, Barnard, as guardian settled with his other wards, but never paid complainant "anything of consequence" of her share of her father's estate. Her husband never reduced, or took steps to reduce her interest in the property to possession. She further alleges, on information, that when Barnard bought the lands at the execution sale he bought with her share exclusively. At any rate, she says, she is entitled to a third of the recovery.

The bill seeks to reach the land by way of resulting trust to the extent of the interest of the complainant in the consideration paid, and for an amount of rents against the defendants who have been in possession. The bill avers, however, that complainant cannot say whether or not the sales of the land under the judgment and execution against Devault are legal and such as to pass title out of Devault. If it should be found that they were not, then she asks that the bids be set aside so far as they might go as a credit on the judgment, and that she have execution of the judg-

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ment; and that she have execution, at any rate, to the extent of the unpaid balance of the judgment. To this end, she asks that an administrator of the estate of S. J. Barnard be appointed.

The bill does not show when the complainant came of age, but the fact is perhaps not important. For, upon her intermarriage with Lane in 1859 the guardianship of Barnard at once ceased: *Jones v. Ward*, 10 Yer., 168; *State v. Parker*, 8 Baxt., 497. From that time, the husband became clothed with the right to demand, receive, and sue for the distributive share of his wife in her father's estate, or in any funds in the hands of the late guardian: *Cox v. Scott*, 9 Baxt., 305. The guardian might settle with him, and pay him the money due the wife: *Sanders v. Forgasson*, 3 Baxt., 249. And the right of action of the husband and wife against the guardian growing out of the guardianship then accrued: *State v. Parker*, 8 Baxt., 497. The bill, considering the original and amended bill as one, is singularly reticent as to what may have passed between the husband and the guardian when the latter was settling with his wards. The only statement bearing on the subject is that the husband never reduced, nor took steps to reduce to possession the complainant's rights and interest in the property mentioned in the bills. But that might have been because he knew that she had no rights. For aught that appears, the husband may have settled with the late guardian as he had the right to do, and received all the money she was entitled to.

The bill, and the argument submitted in support

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of it proceed upon the ground that S. J. Barnard, in the issuance of execution on the judgment recovered by him against Devault, and the sale and purchase of his lands thereunder, was acting as the guardian of the children of George Barnard, or at any rate of the complainant. But the bill itself expressly avers that Barnard had previously thereto settled as guardian with all his wards except the complainant. He had, consequently, ceased to sustain any fiduciary relation to the other wards, was entitled to their shares of the judgment, and to the extent of those shares was acting for himself, and clearly in his own right. His guardianship of the complainant had also ceased with her marriage eight years before. He was, therefore, not acting as guardian at all in the matter, notwithstanding the averment of the bill, which, in the absence of facts properly pleaded to sustain it, must be considered as the unwarranted inference of the complainant. Even if he had been acting in a fiduciary relation to the complainant as to part of the judgment, and for himself as to the residue, there is authority for holding that the complainant could not claim the land, but only a lien thereon for the trust fund used in its purchase: *Treadwell v. McKeen*, 7 Baxt., 450. Perhaps the weight of authority is otherwise: *Gordon v. English*, 3 Lea, 638. But if he stood in no fiduciary relation to the complainant, and appropriated her funds in the purchase of the land, no resulting trust would arise in her favor: *Hawthorne v. Brown*, 5 Sneed, 462; *Ensley v. Balentine*, 4 Hum., 233. A fair deduction from the facts alleged in the bill is that Barnard used the judgment

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in question as his own under a claim of right, and that no resulting trust was thereby created in the land in favor of complainant or her husband, the latter being the person then clearly entitled to the money due from the late guardian to the wife. And this money was not a specific sum, nor was it paid for a distinct interest in, or aliquot part of the land bought, so as to create a resulting trust proper: Perry on Trusts, sec. 132; *Crop v. Norton*, 2 Atk., 74: *White v. Carpenter*, 2 Paige, 217.

But the fact that the husband was entitled to the funds of the wife in the hands of the guardian, at the time of the alleged use of such funds by the guardian in the purchase of the lands in controversy, is conclusive upon the rights of the complainant, even if the facts were sufficient to create a resulting trust. The trust must have been in his favor, as the owner of the funds, not in favor of the wife. If he elected to take the land, it would be a reduction into possession of the chose in action thus converted. If he did not make the election, the *chose in action*, that is the claim against the guardian and the specific funds in his hands would remain. He, the husband, is not a party to the bill as amended, and therefore the question of his rights are not before us. If, as the complainant asserts in her bill, her divorce operated, as would his death, to give her by survivorship choses in action not reduced into possession by him during coverture, she would only take the choses in action, not an interest in land created by their conversion into realty. The defendants in possession of the land,

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and those under whom they claim have certainly acquired a title to the land as against the husband. They have been in possession, under an assurance of title purporting to convey a fee for more than seven years, adversely to all the world. The possession of John Devault of the land conveyed to his children must be taken to be in subordination to the legal title of the children until the contrary appears, and the bill contains no fact inconsistent with this conclusion, even if his deed be treated as fraudulent to his creditors. The complainant can stand in no better position than her husband. And even if she could now elect to follow the debt into the land, it would only be because she had stepped into the shoes of the husband, and must take his rights as he left them. A resulting trust, it need scarcely be said, like any other trust arising by implication of law, may be barred by the statute of limitations: *Cummings v. Stovall*, 6 Lea, 683. And the statute of seven years (Code, sec. 2786), will run in favor of the heirs of S. J. Barnard: *Earles v. Earles*, 3 Head, 366.

The whole case of the complainant rests upon a mistake as to the effect of her coverture on the rights she now seeks to assert. It has been assumed that her marriage was a sufficient excuse for the long delay. But the rights of action of the wife vested at once in the husband upon their marriage. The right to call the guardian to account, to assert her claim to any part of the judgment against Devault, or to follow the wife's funds into the land, belonged to him. He could have sued at any time. The rights of the wife were

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to a settlement out of her choses in action if she had demanded it during coverture, or to the choses themselves upon the husband's death before reducing them to possession. If the divorce confers upon her the latter right, it would only be with all the usual incidents. But by survivorship she would take the choses in action in the condition in which they were left by the husband. If they had been barred by the statute of limitations by his neglect to sue, they would remain barred in her hands. If he has allowed the presumption of payment to arise from lapse of time, the presumption will continue as against her. There is not a single fact stated in the bill which tends to rebut the presumption of the payment of the judgment in question from lapse of time, nor the presumption of payment by the guardian to the husband of the wife's funds in his hands. If the husband is estopped for any reason to enforce the judgment, or recover the land, the wife is equally estopped, for she necessarily takes both rights exactly where he left them.

We can conceive of a state of facts in relation to the land in controversy which might have conferred upon the wife rights independent of the husband. If, for example, at the time of the levy and sale there had been an agreement between the husband and wife on the one side and the late guardian on the other, that her funds in the hands of the guardian or her interest in the judgment, if she had such funds or interest, should be used for her benefit in the purchase of the land, and the title taken to her, a trust might have been created which equity would enforce *recenti*

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facto. But no such case is made, the bill entirely ignoring the rights of the husband, and treating the fund in the guardian's hands as separate estate, or subject to all the incidents of a wife's separate estate. After so great a lapse of time, during which no reason is shown why the husband did not enforce his rights, if in fact he failed to do so, the court will not deal in conjectures in view of possible rights. The judgment in controversy was recovered nearly a quarter of a century before the filing of the bill, and the land sold and bought fifteen years ago. Under these circumstances, and especially when the active parties in the transaction called in question have died, it is the duty of a party coming into a court of equity for relief to make out a clear case. There is no intendment in favor of stale demands.

The demurrers were not drawn with a view to the aspect in which we have considered the case. The bill contains no equity, and should have been dismissed by the chancellor *mero motu*: *Earles v. Earles*, 3 Head, 366. And the decree which he ought to have rendered will be made by this court.

Dismiss the bill with costs.

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MARY WALTON v. G. W. SHARP.

1. GARNISHMENT. *Pleadings and Practice.* Where garnishment is served on two parties, and both answer, it is error to consider the answers of both together in making up judgment against one, at least where the amount involved is over \$50, (\$1,000 under act of 1883, ch. 11).

2. SAME. *Same.* In garnishment proceedings the plaintiff must show judgment and execution.

Question reserved. Whether, where answer of garnishee shows that the legal title to a note is in him, (he holding it as collateral security), and the equitable title is in another, he could be compelled to surrender it, at least until his debt is satisfied.

FROM CAMPBELL.

Appeal in error from the Circuit Court of Campbell county. W. P. WASHBURNE, Sp. J.

HENDERSON & JOUROLMON for Walton.

HOUK & GIBSON for Sharp.

COOKE, Sp. J., delivered the opinion of the court.

This was a proceeding by garnishment. The summons was in the words following, to-wit:

“To Jas. E. Johnson: By virtue of an execution in my hands against the estate of Nancy Walton, I summon you to appear before the judge of the circuit court for Campbell county, Tennessee, at the next term of the circuit court to be held for said county, at the courthouse in Jacksboro, on the third Monday of March, 1881, to answer on oath such questions as may be

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propounded to you touching your indebtedness to Nancy Walton, or her credits, effects or property in your hands," etc.

This 6th day of December, 1880.

JOHN HUNLY, Deputy Sheriff.

On which was endorsed the following garnishment summons: "G. W. Sharp v. A. Huckaby *et al.* Executed a true copy of the within on Jas. E. Johnson, December 6, 1880, to answer at the March term of circuit court, 1881."

JOHN HUNLY, Deputy Sheriff.

A precisely similar garnishment in the same words, except the name of the garnishee, and with the same endorsement upon it, was on the same day, by the same official, served upon one Winston Bowman.

Both garnishees appeared at the circuit court and filed their answers. Johnson answered that he was not indebted to said defendant, nor had any effects in his hands belonging to her, nor knew of any one else who had. That the defendant had duly assigned to him a note on one Winston Bowman with S. Hunter and S. C. Baird security, upon which payments have been made in payment of tuition fees then earned and over due, and as security for fees contracted for and then being earned. Of which transfer the maker of said note had due notice. That said note was for \$275, or thereabouts, with no credits on it that he remembered of. That Mrs. Walton brought it to him as pay or security for tuition fees, and said she might possibly take it all up in tuition. That about \$75 had been taken up and the tuition that

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would be due at the end of that session would be six dollars more. That he did not intend to teach another session. Don't think he has received notice that any payments have been made on the note. Did not know whether he would teach another session, but it was not his present intention to do so. The note was given four or five years ago and was payable one day after date. That he held the note as his, but if he should stop teaching would consider that he should settle the balance with her. The note draws interest at ten per cent.

Bowman's answer stated that in 1876 he borrowed from Nancy Walton the sum of \$275, and since that time has made some payments, which amount to about \$40 at different times, which have not been credited upon the note, but should be. He is informed and believes that said note was transferred or delivered to J. E. Johnson before the service of the garnishment, and does not know who is the legal owner of said note. He admits that he owes a balance on said note but owes it to Johnson, who has the possession of said note and not to Nancy Walton.

The record shows that upon consideration of the original amended answer of J. E. Johnson, and of the answer of Winston Bowman, the court was of opinion that the note referred to in the answer of J. E. Johnson, is still the property of the defendant, Nancy Walton, and that he, Johnson, holds it as collateral security for the sum of \$81, due or to be due him on his contract with the defendant, and that the balance due on said note was liable to garnishment, and ad-

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judged that the garnishee, Johnson, surrender said note to the sheriff, who will proceed, without delay, to collect it, and out of the proceeds pay to said Johnson said sum of \$81 with interest until paid, and apply the residue to the satisfaction of the judgment of G. W. Sharp, and in case of the failure to surrender said note on demand, it was further adjudged by the court, that the plaintiff have and recover of J. E. Johnson the sum of \$349, being the amount due on said note less the sum of \$81 adjudged to be due him, and award execution for the same.

From this judgment Nancy Walton has appealed. This appeal brings the entire case before us, not only as to the plaintiff in error, but also as to the garnishee, Johnson: *Kalesky v. Curry*, decided at Jackson but unreported; 11 Heis., 549; King's Dig., 3023.

It was error in the trial judge to consider the answers of both garnishees together in making up his judgment against one of them. The liability of each must rest upon his own answer: 4 Hum., 299. Where the amount involved is less than \$50, the answer is not conclusive but the plaintiff may controvert any of the facts contained therein: Code, sec. 3103. But here the amount is over \$50, and if it were the *ex parte* answer of another would not be competent evidence against the garnishee whose answer was contested.

The answer shows that the legal title to the note was in the garnishee, Johnson, with an equitable interest in it as Mrs. Nancy Walton, and it is at least a serious question, whether he could be compelled to

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surrender it to another, at least until the debt for which it was assigned to him was satisfied. But in the view we have taken of this case, it is unnecessary to decide this question.

The garnishment summons wholly fails to show in whose favor the execution was, which is stated to be in the hands of the officer, or upon what judgment it was issued; and even the return of the officer upon it contains no mention of any judgment against Nancy Walton. There is neither judgment nor execution shown by the record to have existed any where in favor of the defendant in error against the plaintiff in error; nor is there any judgment or execution of any kind alluded to or shown to exist; nor is there any amount specified which the defendant in error, Sharp, claimed to be entitled to collect from the plaintiff in error. This is a fatal defect in these proceedings.

In the case of *Kaylor v. Brunswick & Brother*, this court, Chief Justice Deaderick delivering the opinion, says: "In this case the execution against the defendant is in the record as part of this cause, brought up by the appeal from the justice's judgment against the garnishee with the other proceedings against him properly brought up, *for without* it the sheriff's summons of the garnishment would have been a nullity": 6 Heis., 239. In the case of *Railroad v. Todd & Williams*, 11 Heis., 555, this court says: "It is very clear that the judgment against the garnishee must depend upon the judgment against the debtor, and without a judgment against the debtor there can

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be none against the garnishee. Citing 4 Yer., 461; Cooke, 478.

The Referees have made a report by which they find that the judgment of the circuit court should be affirmed, to which exceptions have been filed. The exceptions must be sustained and the report set aside.

The judgment of the circuit court must be reversed and the proceedings dismissed with costs.

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DAWSON and CAMPBELL v. L. B. HOLT.

1. LIBEL. *Ratification.* A person may adopt and ratify an unauthorized signature of his name to a libelous publication.
2. SAME. *Same.* Mere silence in relation to a libel published over a person's signature, and a failure to disavow it to the injured party within a reasonable time after knowledge of the publishing, are not a ratification of the act as a matter of law, even in a case where the person had signed a writing for publication of which the article published was a condensation and material modification, and had refused to publish a denial. They were facts from which an actual ratification might be found.
3. SAME. *Evidence.* It is not error in a trial for libel to refuse to allow the defendant to prove that he had uniformly denied that he had signed or authorized the libelous publication, unless the denial was made in the presence of the plaintiff, or brought to his knowledge.
4. SAME. A publication which contains a single false libelous statement is a libel, although it may contain defamatory statements which were unauthorized, true, or not proved.
5. SAME. *Agent.* Where authority is given to an agent to publish libelous words, and a publication is caused to be made by that agent in substantial correspondence with these words, the principal will be liable.

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6. **SAME.** *Same.* Authority to publish a writing to the effect that a person is a troublesome fellow to his neighbors, and has made a particular attempt to hire another to swear falsely, will not authorize a publication that the person is a pest to the community and that there is now overwhelming evidence on file clearly establishing his guilt of subornation of perjury.

FROM COCKE.

Appeal in error from the Circuit Court of Cocke county. J. G. ROSE, J.

W. J. MCSWEEN and G. W. PICKLE for Dawson.

W. W. LANGHORNE and H. H. INGERSOLL for Holt.

COOPER, J., delivered the opinion of the court.

Holt sued Drury Dawson, W. H. Campbell and several other persons for libel. The judge, who tried the cause without a jury, found in favor of the other defendants, but rendered a judgment against Dawson and Campbell, from which they appealed in error.

Holt having had a lawsuit with one Livingston, undertook to denounce him in a publication in the county paper, signed with his initials. Thereupon Dawson, Campbell and others signed a written communication to the same newspaper sustaining the character of Livingston and denouncing that of Holt, stating, among other things, that Holt was a pest or troublesome fellow to his neighbors, and that there was evidence on file that he had tried to hire a negro to swear falsely. This paper was entrusted to Livingston for publication. He carried it to a correspondent

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of the newspaper, who said it was too long, rewrote it, and signed the names of the appellants and others, without direct authority from them, to the new draft. The writing thus prepared and signed was published in the newspaper. It stated, among other things, that the signers knew Holt to be "a man of corrupt principle, noted for meanness and villiany, and has ever been a pest in our community. He has no regard for his word, and there is now overwhelming evidence on file in the clerk's office clearly establishing his guilt of subornation of perjury." The action was for the libel in the printed article, setting the article out in *hæc verba*. There is no proof to show the contents of the document actually signed by the defendants, except to the extent above stated, so far as it related to Holt. The document was not produced, although notice to produce it seems to have been served at least upon the defendant Dawson. The proof shows that both of the defendants saw the publication shortly after it was made, and that neither of them ever disavowed the publication to Holt or by counter publication, and there is proof tending to show that Dawson refused to disavow it to a person sent by Holt to see him on the subject, and said he had signed it.

"The court holds," says his Honor the trial judge, in the bill of exceptions, "that defendants Drury Dawson and W. H. Campbell are responsible for the published libel, not by reason of any previous direction or authority to publish that particular article, but by their subsequent assent, and ratification of the assumed

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authority from them to do so, resulting from their acquiescence and failure to disavow the act of publication in their name within a reasonable time after knowledge of the facts. Under the circumstances it was their legal duty to have promptly disavowed the publication; and this disavowal should have been to the plaintiff, and in such manner as to repair the injury so far as they reasonably could. Mere statements to other persons than the plaintiff, in casual conversations about the matter, that the published paper was not the same, or anything like the paper they signed for publication, did not fill the measure of their legal duty to the plaintiff."

Treating the article sued on as neither signed by the defendants, nor published by their authority, his Honor states the law to be that they might ratify the use of their names in the signing and publication by their subsequent conduct, and that they did in fact ratify it by their assent thereto, and failure to disavow the act within a reasonable time after knowledge of the fact. And he distinctly says that the disavowal should have been made, under the circumstances, to the plaintiff, and in such manner as to repair the injury so far as they could. The counsel of the appellants insists that there can be no ratification of a previously unauthorized tort, and that the failure to disavow in the mode stated would not in law be a ratification.

If his Honor meant to lay it down as a general proposition of law that every person whose name is used without authority in the publication of a libelous

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article in a newspaper, ratifies the act by failing to disavow it to the party injured in a reasonable time after knowledge of the fact, we think he was clearly in error. We know of no principle of law which imposes upon an innocent person, whose name may have been thus used, the duty of prompt diligence in disavowing the act to the injured party, under the penalty, in case of failure, of being held to be the guilty party. A denial of the act on all proper occasions, or a public disavowal in the same newspaper, or in some other mode, would be sufficient to protect an innocent party. His Honor, no doubt, intended to confine his law to the particular case before him, where the defendants had signed a writing for publication of which the article published was a condensation and material modification, and where one of the defendants, when approached by an agent of the injured party, had refused to make any concession, and asserted that he could prove more than he had put his name to. But even in such a case the charge of the law is too broad. Mere silence, and a failure to disavow the act to the plaintiff, would not, under the circumstances, amount to a ratification as a matter of law. They would, at most, be facts from which in connection with the other facts and circumstances, an actual ratification might be found. A tort committed without positive previous authority may be ratified, and especially if the tort be a libelous publication in one form, which the party had authorized to be published in another form: *Bryan v. McGuire*, 3 Head, 530. And there can certainly be no reason why a person

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may not adopt or ratify a previously unauthorized signature of his name to a libelous instrument, as well as a previously unauthorized signature to any other written instrument. If his Honor, the trial judge, upon a general finding against the appellants, had announced as the law by which he had been guided, that there might be a ratification of a libelous publication purporting to be signed by him, and that the fact that the party had authorized the publication of a similar article from which the actual publication had been condensed, and had failed to disavow it, might be looked to, in connection with the other facts and circumstances, to determine whether there had been a ratification, his finding would have been as conclusive as that of a jury, and would have been warranted by the facts.

The difficulty in this case is that, although we may treat the judgment below as a general finding of the facts against the defendant, the trial judge has not limited his statement in the bill of exceptions to the principles of law which guided him, but has interpolated certain findings of fact. He finds, he says, that the defendants Dawson and Campbell had signed for publication in the newspaper an article in writing vindicating the character of Livingston; that this article was not in fact published, and that its exact purport was not shown; that this article was rewritten, reduced in length, "and perhaps materially modified, the names of defendants signed thereto without authority, and thus published." These two defendants, he adds, did not in the first instance authorize the publication

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made, but did sign for publication a different paper, "the contents of which are not shown." There is some warrant, from these statements, in the position of the counsel of the appellants that the trial judge did not find any previous authority by the defendants for the publication of the libel sued on, nor a subsequent ratification in fact, but only a ratification as matter of law from the failure of the appellants to disavow the publication to the plaintiff, according to the legal duty, in his Honor's opinion, imposed upon them by law.

In this view, it becomes necessary for us to examine the facts, and render such judgment as the court below should have rendered: *Wheeler v. State*, 9 Heis., 393. It would be otherwise, however, if legal testimony was rejected, and this, it is insisted, was done. The plaintiff introduced one witness, who testified that he had a conversation with defendant Dawson about a week after the publication, and said to him that people ought to be careful about what they signed, to which defendant replied that he had signed it, and would do it again. Another witness proved, that, at the instance of plaintiff, he had called on defendant Dawson, and told him that if he did not sign the paper published, and would publish the fact in the same paper, the plaintiff would be satisfied; that defendant replied he did sign the paper, and could prove twice as much as was in it. A third witness deposed that he had called upon Dawson after the suit was brought, with a view of making peace, and that defendant said to him, he would not give a nickel for it, that he could prove twice as much as the paper contained which he had

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signed. The defendant Dawson, when examined as a witness on his own behalf, testified that in these conversations he referred to the paper he had actually signed, not the paper published. He was then asked by his own counsel, if he had not stated to other persons than the witnesses of the plaintiff, that he had not signed the article published, or authorized its publication. The court, upon the objection of the plaintiff, excluded the evidence. The defendant Campbell, when examined as a witness by Dawson, was asked if he had heard defendant Dawson deny the published paper in his presence, and in the presence of others. He was also asked if he himself did not uniformly deny that he signed the published paper, or authorized its publication to all persons after it came to his knowledge. Upon objection by the plaintiff, the witness was not allowed to answer these questions, except as to conversations he may have had with, or in the presence of the plaintiff, or which may have been communicated to him.

It can scarcely be seriously contended that a defendant to a libel suit can be allowed to introduce as evidence on his behalf his own denial of guilt to third persons. That would be to make evidence for himself: *Rea v. State*, 8 Lea, 356. Such denials would afford an easy way of manufacturing testimony either to disprove the charge, or in mitigation of damages. Besides, there was no contest between the parties, or conflict in the testimony in relation to the facts touching the proposed denials. The proof was clear that the defendants had not signed the published paper, nor

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previously authorized its publication as a whole. The statements of the defendants as witnesses in that regard were not called in question. The testimony was, therefore, not competent in corroboration of Dawson as a witness, by showing that he had made consistent statements, while the facts were recent. The conflict between the plaintiff's witnesses and Dawson was as to what passed between them, and the credit of neither was attacked by proof of contradictory statements or otherwise.

The real issue between these litigants was whether the defendants Dawson and Campbell authorized the publication, not of the entire article published, but of the libel on Holt contained therein, or subsequently ratified the publication. A publication which contains a single libelous statement which is false is a libel, although it may contain defamatory statements which are true, or, it may be added, other statements which are unauthorized or not proved: *Melton v. State*, 3 Hum., 389; *Hancock v. Stephens*, 11 Hum., 507. The appellants did sign, and deliver to Livingston for publication in the county newspaper, a writing purporting to be a communication from them, and the publication actually made was the result of the action of the agent. Dawson himself testifies that the original paper signed by him "did contain a statement that Holt had tried to have a negro boy to swear a lie, and also said something about Holt being a troublesome fellow to his neighbors." Campbell testifies that there was in the paper, "something about his trying to get a negro to swear false, and about Holt being a troublesome

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man, and always wanting to law his neighbors." McSween, who drafted the article published from the original writing, says that the latter "used the word pest, and also stated that there was evidence on file showing that plaintiff had tried to hire a negro to swear falsely." The published article states that the signers knew Holt "to have been a pest in our community," and that "there is now overwhelming evidence on file in the clerk's office clearly establishing his guilt of subornation of perjury." The language of the publication is libelous: *Haws v. Stanford*, 4 Sneed, 520; *Dunn v. Winters*, 2 Hum., 512; *Williams v. Karnes*, 4 Hum., 9. So is the language shown by the witnesses to have been used in the original writing, but the language of these latter and of the publication are not identical.

The rule as to a variance between the words alleged in pleading and the words used, is that it is sufficient if they correspond substantially: *Pursell v. Archer*, Peck, 317; Townshend on Sl. and L., sec. 364. But it seems that the words alleged cannot be proved by showing that the defendant published the same meaning in different words, even if equivalent and of similar import: Townshend, sec. 364; Per Totten, J., in *Hancock v. Stephens*, 11 Hum., 508. Upon indictment, the libel must be set out according to its tenor and effect, not substance: *State v. Brownlow*, 7 Hum., 63; *State v. Smith*, 7 Lea, 249. But it has been held that one who writes an article in English, and employs another person to translate it into German and publish it, will be liable if the German article so published is libel-

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ous, although the translation is inaccurate: *Wilson v. Norman*, 27, Wis., 598. It has also been held in case for written slander, where the reporter of a newspaper proved that he had written down from the defendant's mouth the statement which he afterwards sent to the editor, and that a paragraph which afterwards appeared in the papers was in substance the same, that that was so published might be considered as published by the defendant: *Adams v. Kelly*, 1 Ry. & M., 158. The authorities are in a hopeless confusion as to what will, or will not be a material variance between the words alleged and the words written. But where authority is given to an agent to publish libelous words, and a publication is caused to be made by that agent in substantial correspondence with those words, we are inclined to hold the principal liable. In this case, however, the libel authorized to be published was, in substance, that the plaintiff was a troublesome fellow to his neighbors, and had tried to hire a negro to swear falsely. The publication was that the plaintiff was a pest to the community, "and there is now overwhelming evidence on file in the clerk's office clearly establishing his guilt of subornation of perjury." The authorized words only imported an attempt at subornation of perjury, while the published words aver the existence of overwhelming evidence of the commission of the offense. The publication was not authorized by the writing signed by the appellants.

There is no evidence against the appellant Campbell that he ever ratified the libel as published. But we think the evidence does show such ratification by

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the appellant Dawson. The judgment will, therefore, be affirmed as to Dawson, and reversed as to Campbell, and judgment rendered in favor of the latter for his costs.

STATE v. WM. SHELLEY.

CRIMINAL LAW. *Perjury. False swearing in U. S. Courts.* No indictment for perjury can be predicated in the State courts upon the false swearing of a party before a United States judicial tribunal in a case pending in such tribunal.

FROM BLOUNT.

Appeal in error from the Circuit Court of Blount county. S. A. RODGERS, J.

ATTORNEY-GENERAL LEA and R. N. HOOD for the State.

WILL A. McTEER for Shelley.

FREEMAN, J., delivered the opinion of the court.

The defendant was indicted in the circuit court of Blount county, and charged with the crime of perjury, by swearing falsely in a case pending before a United States Commissioner, in which the United States was plaintiff and John Norwood defendant, in which

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the question was, whether the said Norwood was guilty of retailing liquors in violation of the United States internal revenue laws.

The averments of the indictment show the materiality of the testimony given in that case, and the only question raised by the demurrer (which was sustained in the court below), is, whether any offense against the law of the State of Tennessee is charged by the facts averred. In other words, the question is, whether a false oath taken before a judicial tribunal of the United States, in a case pending before such tribunal, the oath being taken in a county of our State, is subject to indictment in this State and punishment as perjury?

We have not access to the authorities by which we might examine this question in the light of the decided cases raising this precise question as fully as would be desirable. But the question is one, we take it, well settled, and hardly admitting of doubt.

Perjury is defined by our Code to be where "any person wilfully and corruptly swears or affirms falsely in a material matter upon oath or affirmation *required or authorized by law.*"

This definition is found in the chapter of the Code, under title "Offenses against public justice." It is in this correctly characterized, as the essence of the offense is the corruption and hindrance of public justice as administered in our courts. To protect from this evil is evidently the purpose of the penalties inflicted. It is not every false oath, however reprehensible or corrupt, that is made penal by the statute, but only such

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“oath or affirmation as is *required* or *authorized* by law,” and even then it must in all cases be averred and proven, that the false matter was material to the issue on investigation, or to the end sought or intended to be attained by the oath taken. These elements indicate definitely the purpose of the Legislature to protect by the penalties imposed from corrupt swearing, and its results, all proceedings had under our own laws, and as certainly exclude the idea that these penalties are intended to give protection against the effect of false swearing in other jurisdiction than our own, or in the proceedings of any other courts, or in the administration of the laws of any alien government—“An oath or affirmation required or authorized by law, can in the nature of the thing only mean an oath or affirmation required or authorized by our own law, not the law of another State, country or jurisdiction. That the Federal tribunals and Federal laws in reference to this matter, are foreign to our State, is a question we take it beyond doubt. For these reasons we would hold it clear the indictment charges no offense of perjury included in the definition of that offense under the section of the Code quoted. The public justice, or any proceeding authorized by our law, has not been corrupted or in any way interfered with by the oath charged to have been taken, therefore no violation of our law intended to be prevented has occurred.

But it is equally clear that the offense is against the public justice and purity of administration of the law of a different jurisdiction, occurring before a court

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of that jurisdiction, that is, of the United States, and one punishable by the laws of that government, the protection of its administration of its own laws being a matter peculiarly within its own care, and a matter in which it would be intrusive and presumptuous on the part of the State of Tennessee to intervene in any way. Every government claims and exercises this right for itself.

In accordance with this, the United States Government has prohibited the offense now charged, and imposed a penalty of fine of not more than \$2,000, and imprisonment at hard labor, not more than five years, and of being incapable of giving testimony in any court of the United States until such time as the judgment against the party is reversed." See Revised Stat. U. S., 5392.

From the construction we have given our own statute, and the provision of the United States statute cited, it is seen what is the well understood line of right and duty on the part of every government in reference to the question here presented, that is, that every government claims and exercises exclusive jurisdiction to control and protect from intrusion or injury the public justice as administered in its own courts, and the purity of administration of its own laws. This is essential to the independence and efficiency of any and every sovereignty, a right that could not be surrendered. The principle we have announced is distinctly recognized by the Supreme Court of the United States in the case of *United States v. Bailey*, 9 Peters R., 341, (Cush. ed.), where it was

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held that a party was punishable however, under the law of the United States against false swearing, because the oath, though taken before a State magistrate, was to be used as evidence in support of a claim before a department of the Federal Government, in support of a claim under investigation. But this was put on the ground that the oath was authorized by the regulations of the Department, that is by the authority of that government.

The rule is well stated in a dissenting opinion by Justice McLean, p. 351: "Any official act of a Federal officer, under the jurisdiction of a State, which has not authorized such act by him, is extra judicial, and in no point of view legal; nor can an oath administered under such circumstances, however false, be punishable under a general statute of the State against false swearing. The act of administering the oath being done without authority (that is of the State) is void. It subjects the false swearer to no greater penalty than if administered by a private citizen without any pretense of power. He adds: "From these considerations it would seem that no punishment could be inflicted by a State tribunal, under an act against false swearing, where the oath had been administered by a Federal officer, whose act was not sanctioned by any law of the State."

This is unquestionably the true principle governing the cases. The trial was being had before a tribunal of the United States, the false swearing was an offense against the public justice of that government, was subject to be punished under its law, but was in no way

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an offense against the law of Tennessee, nor the administration of public justice by any tribunal of said State against the State of Tennessee.

But we find the question has been definitely settled by adjudications, both State and Federal, since the above case, and is now beyond dispute. In the case of *Brown v. United States*, 14 Amer. Law Register, 566, in an opinion by Erskine, District Judge, it was held, after a full review of the authorities, that where an indictment and conviction in a State court showed the defendant had been charged with perjury committed in a proceeding before a United States Commissioner, that the indictment showed that the perjury alleged was not a crime against the State, and the proceedings therefore void. In this case, for this reason, the convicted party was discharged on *habeas corpus* by the United States Court. This opinion was affirmed on appeal by Judge Bradley, sitting in the circuit—*vide Ross v. State*, 55 Ga., 192; 21 Am. R., 278. We need not go over the authorities on this question. They will be found cited in the above opinion, and are conclusive of the question. See also 2 Bishop Cr. Law, sec. 1023, *et seq.*

Let the judgment be affirmed.

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R. M. BARTON, JR., Adm'r B. F. McFarland *et al.* v.
W. H. & T. W. TURLEY.

1. CHANCERY PLEADINGS AND PRACTICE. *Appeal. Final decree.* There can be no appeal to the Supreme Court except from a final decree settling the rights of the parties.
2. SAME. *Same. Same.* The report of C. & M., with some exceptions thereto overruled, and some sustained, with directions and instructions for modification of the report, does not form the basis of such final decree settling the rights of the parties, from which an appeal can be taken.
3. SAME. *Same, Same.* The fact that no further exception could be taken successfully, cannot change the character of the report into a decree final by the court.
4. SAME. *Same. Same.* It is not that a decree must be *final* in the sense that the Chancellor cannot reverse it at a subsequent term, but that it must be *final* in the sense of being a complete settlement of the rights of the parties.

FROM GRAINGER.

Appeal from the Chancery Court at Dandridge. H.
C. SMITH, Ch.

SHIELDS & SHIELDS for complainants.

JESSEE G. WALLACE for defendants.

FREEMAN, J., delivered the opinion of the court.

This bill is filed mainly for the purpose of having an account of a series of transactions extending over several years between McFarland and W. H. Turley. These matters include the advance of money

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by Turley to McFarland at various times—debts paid and assumed by him for McFarland—with transfers of debts due to McFarland to be accounted for by Turley, out of which there arises a number of questions in taking the account. The main matter litigated now before us, is the rights of the several parties to this suit, growing out of a sale of “one undivided half-interest in” what is known as the Bean’s Station property, in Grainger county, together with another small tract of land adjoining it, the sale made October 20, 1873.

This last property had on it a hotel, which was intended by the parties to be opened, refitted and furnished in view of an anticipated railroad confidently expected in no great time to be completed to that point. This hotel was repaired and furnished, and kept open for several years, but the railroad failing, the expectations of the parties were not realized, and so in a few years had to be abandoned. The cost probably of the repairs and furnishing the hotel property, amounted to near \$3,000. W. H. Turley was nominally the owner of the other half of the property, the equitable title being in T. W. Turley, his co-defendant, to whom it was some years after the sale to McFarland, conveyed by W. H. Turley. It having been occupied by McFarland, or McFarland and W. H. Turley, and rented out afterwards by T. W. Turley, all these matters growing out of the partnership of McFarland & Turley, and joint ownership of McFarland and T. W. Turley, are involved in the account. In addition, the question of payment for the

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property by McFarland, and proper mode of taking the accounts, as between W. H. Turley and himself, in the application of a fund assigned by McFarland to Turley, known as his claim against Branner's estate, growing out of cotton speculation, as the consideration for the sale of the property, the *surplus*, if any, to be appropriated to *other* liabilities of McFarland to Turley, as maintained by one side, by the other, that this fund to be received from Branner's estate is to be *first* appropriated to the other liabilities, and their surplus to the Bean's Station indebtedness.

It is seen from this statement that a complicated state of accounts is to be investigated, and numerous questions decreed upon in order to the adjustment of the rights of the parties.

After several informal references were had, the decrees settling nothing, a decree was ultimately made by Judge Rose, sitting by interchange for the chancellor, in which the rights of the parties were defined, and the clerk ordered to report on this basis.

On the 26th of September, 1881, the master filed an elaborate report, in which he complied with the decree, by ascertaining what he deemed the results of the proof on each specification referred to him by the chancellor. There is, however, in this report, no summary showing the final balance or net result of itemized report, though the items as reported do furnish the elements from which such result could, with more or less readiness, be ascertained, dependent on the familiarity of the party attempting to ascertain this result with the case in hand.

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To this report numerous exceptions were filed by the parties, both complainants and respondents. These came on to be heard before the chancellor, when the following decree was entered:

After reciting "that the cause came on to be heard on former reports, exceptions thereto, proofs and report of the clerk and master filed 26th October, 1881, and exceptions to the same filed jointly by complainants, and exceptions by defendants, and argument of counsel, the premises seen, and the court holds that all the exceptions on the part of complainants and R. M. Barton, Sr., and Wm. McFarland, be disallowed, and that all the exceptions on part of the other defendants be disallowed, except exception No. 4, which is sustained, and the cause recommitted to the clerk and master to restate the account, and modify his report by charging the \$1,441.61, which was rejected in his report of 26th September, 1881, against the estate of McFarland, and allowing said sum as an additional charge in favor of Turley, but in all other respects the modified report will be as shown in said report of date 26th September, 1881.

The question of costs is reserved until the coming in of said report. From which decrees and orders the complainants, R. M. Burton, Jr., Adm'r, etc., and defendants, R. M. Barton, Sr., and Wm. McFarland, pray an appeal to the next term of the Supreme Court, etc., and the defendants, W. H. Turley and T. W. Turley, in like manner pray an appeal, and the court being of opinion this is a proper case for appeal to settle the equities in the Supreme Court, be-

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fore the account is finally taken, said appeals are granted.”

Then follows an allowance of time within which to give bonds for the appeals, and agreement that a cer- original exhibit shall be sent up with the record.

This is the entire decree, and the question is presented, whether we can treat it as a final decree under the decisions of the court, so as to hear and dispose of the case on the merits. The Referees have reported it is not such, to which exceptions are filed, and the question must be decided. Inasmuch as counsel on both sides seem anxious to have the case settled, we have no disposition to apply the rule with strictness beyond the imperative requirements of our law, and a reasonably consistent regard to our decisions shall require.

The case is simply a report, with the exceptions overruled, except one, which is sustained, and directions given as to the application of the credit of \$1,441.61, so that when this modification is made, and the result ascertained and made part of the report, we should have a report before us, not subject to further exception, on which a decree could be made, but the question is, can we by any consistent reasoning reach the conclusion that a report, however complete, with nothing affirmatively decreed on it by the court as resulting from the report, is a final decree in the sense, letter or spirit of our law?

The fact that no further exception could be taken successfully, cannot change the character of the report into a decree final by the court. It is still but a

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report made in pursuance of an interlocutory decree. Suppose all exceptions filed had been withdrawn, and a decree entered to that effect, would this decree be a final one? Could an appeal be prosecuted to test the rights of the parties, and whether the interlocutory decrees and orders under which it was made were proper dispositions of their equities? Can a report, with exceptions overruled, stand higher, as a final decree, than one unexcepted to, or exceptions withdrawn, where there is no affirmative action of the chancellor ascertaining the result of the facts thus shown, with a decree adjusting the equities and decreeing the rights of the parties on the basis of the facts thus standing, as proven before him?

The case of *Meek et al. v. Mathis*, 1 Heis., 335-6, *et seq.*, is supposed to hold a doctrine that makes the decree before us a final one from which an appeal will lie. But on carefully looking to that case it will be found precisely the opposite of this view. The head-note accurately states what was held in the first opinion, which is, "that the decree in that case giving a recovery of the amount due upon the footing of a note on file in the case, with a reference to ascertain the amount, is so far final *that* it cannot be disregarded by the chancellor of his own motion, or otherwise than by a bill of review *after* the term at which it was entered."

This is all clear. The use of the term *final* is not strictly appropriate, nor necessary to express the idea intended by the learned Chief Justice. It is not that the decree must be *final* in any sense in order

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to be beyond the power of change by the chancellor after the term at which it was rendered, but that being a complete decree settling rights, it could not for this cause be disturbed by the chancellor. In other words, he could not reverse his own decree at a subsequent term.

But in a subsequent opinion in the same case, on motion of complainants in a cross-bill for a writ of error, in order to reverse the decree discussed in the former opinion, the Chief Justice expressly held that the decree referred to was not final in the sense of being such a decree as could have been appealed from as a matter of right, or that a writ of error could be prosecuted on.

The question on the motion for writ of error was sharply made—for if the decree referred to, made September, 1868, was final in this sense, then the application came too late,¹ but if the subsequent decree was the final² decree, made on coming in of the report ordered, it was in time.

His Honor on this question definitely held the parties could not have appealed of right from the decree of 1868, but only at the discretion of the chancellor, and that the³ decree made in March, 1869, when the report of the master was acted on, and in pursuance of it, was the final decree, and on this ground the writ⁴ of error was allowed; so there is nothing in this case that will enable us to hold the present decree final,⁵ but the contrary.

For these reasons, as well as others that might be given, we are compelled to hold this decree is not a

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final decree, such as could be appealed from in the state of this record, and remand the case to be proceeded to a final decree. The costs of this court will be divided, as both parties have appealed.

SAMUEL DISNEY *et al.* v. COAL CREEK MINING AND
MANUFACTURING COMPANY.

11L	607
116	68
117	732

1. **EJECTMENT.** *Grant. Boundaries.* In fixing the boundaries of granted land, in the absence of marked lines and corners, where the line runs up a creek, a locative call of a branch running into the creek will control the call for distance, and the jury may find that the line ended at the branch, although the call for distance would carry the corners beyond that point.
2. **SAME.** *Same. Plat and survey.* Where, in an ejectment suit, the rights of the parties turned upon the length of the line of one of the calls of the defendant's grant, and the defendant in his plea expressly recited and claimed that the line was forty poles by the survey and seventy poles by the grant to the corner designated, and the plat and survey in which the grant was issued were introduced in evidence without objection, it was not error for the trial judge to charge that, in the absence of satisfactory proof of marked lines and corners, and where there are doubts in regard to the boundaries arising from the calls of the grant, the plat and certificate of survey might be referred to in explanation of the grant, and as evidence of the locality of the land granted; and the charge is probably correct in all cases where there are doubts in regard to the boundaries arising from the calls of the grant when applied to the ground, and the natural and artificial monuments.

FROM ANDERSON.

Appeal in error from the Circuit Court of Anderson county. W. B. STALEY, Ch., presiding by interchange.

Disney v. Coal Creek Mining and Manufacturing Co.

HENDERSON & JOUROLMON and T. J. WEBB for Disney.

ANDREWS & THORNBURG for Company.

COOPER, J., delivered the opinion of the court.

Action of ejectment brought by the Coal Creek Company against Disney and others, in which the verdict and judgment were in favor of the company, and the defendants appealed in error.

The defendants put in a plea disclaiming title to any of the land sued for except several small tracts set out by metes and bounds. There was no contest as to any of these tracts except one, it being conceded that the defendants had the better title to all the others. The tract in controversy is known as the Bowling land, and the contest was over a strip of land on the western boundary of the tract. The land lies in the cove of the mountain, between two forks of Coal Creek, the boundary lines forming an irregular angle down the valley, the disputed line being straight, and constituting the hypotenuse of the triangle. The plea of the defendants described the land as beginning on a white oak, thence south 50 degrees east 13 poles to a sweet gum, thence north 62 degrees east 13 poles to a beech at the spring, and so on, giving sixteen calls, with the courses, distances, and a tree or trees at the terminus of each call, until they reached the corner from which the disputed line was run. The difficulty grows out of the thirteenth call and the call of the disputed line.

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The plea sets out the first of these thus: "Thence north 13 degrees west 40 poles by the survey, and 70 poles by the grant, to a sourwood near the branch." It describes the disputed line as: "Thence south 22 degrees west 247 poles by the survey, and 277 poles by the grant, to a black oak." If the 13th call end at 40 poles, then, for the purposes of the present decision, the location of the disputed line as found by the jury is correct. If the 13th call is extended 70 poles, then the beginning corner of the disputed line will be carried higher up the mountain. And the latter line will necessarily bring within the triangle a larger extent of territory. The grant to this land issued to Bowling by the State calls for 100 acres. The line found by the jury includes more than the number of acres called for by the grant. If the line be run, as claimed by the defendants, with the calls of the grant, the quantity of land included would be 100 acres.

The grant to Bowling shows on its face that it was based upon a particular entry, and the land "surveyed the 14th day of March, 1828." The survey was introduced in evidence by the plaintiff, without any objection on the part of the defendant, and shows that the 13th call is but 40 poles as set out in the plea, and the call of the disputed line for 247 poles. All of the other calls of the survey and grant correspond in every other respect. Each call, as we have seen, gives course and distance, and designates a particular kind of tree as its terminus. But the land has been cleared up beyond the begin-

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ning corner of the disputed line as found by the survey, and the trees cannot now, in many instances, be found. But the disputed line as run by the grant commences and runs mainly through the woods, without showing any trees marked either as corner or line trees. The same is true of the line as found by the jury. The plaintiff contended in the court below for still another line running principally through cleared land, but this contention is, of course, not before us, the plaintiff having acquiesced in the verdict and judgment.

The proof shows that the trees called for in the grant, wherever still standing, are marked as corner trees. For example, the beach at the spring of the second call, and the sweet gum of the next call, are found marked. The 13th call is 40 poles by the survey, or 70 poles by the grant "to a sourwood near the branch." The distance of 40 poles "stops right on the bank of a small branch" that runs into Coal Creek on the east, "at its mouth on a little poor knoll," say the witnesses, where a sourwood tree would be likely to grow. Another branch runs into the creek from the west immediately opposite. The point is therefore one likely to be noted in a survey. The line at 70 poles would end in the creek bottom a few poles from the creek, rich land in which the sourwood tree does not often grow. The remaining lines, if run from this point, would strike the woods, but there are no marked trees, such as are designated by the calls. If run from the branch, the lines run out into the cleared fields, and there are no trees,

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and no marked tree near, unless it be a large white oak five poles from where the 15th line gives out, which one of the surveyors thought was marked, he alone having examined it.

The law presumes an actual survey where a grant issues, and on trial in ejectment the grant is conclusive evidence of the fact: *Garner v. Norris*, 1 Yer., 62. In ascertaining boundary the rule is to find the lines and corners, or such as have been made; and if there are no monuments, then to take the course and distance called for: *McNairy v. Hightower*, 2 Tenn., 302. To establish boundary it is not indispensably necessary that some corner or marked line should be proven to exist. If it be proven to have existed, it is sufficient: *White v. Hembree*, 1 Tenn., 534. The safe rule is to compare the calls with the artificial and natural marks on the ground: *Payton v. Dixon*, Peck, 148. If a boundary called for can be ascertained, distance must yield, and we must stop at the boundary: *Bowman v. Cox*, Peck, 364. General or directory calls yield to locative calls, and calls for course and distance are locative, but not as determinedly so, as calls for natural or artificial objects. When such objects are called for as special and locative, not merely general or directory, then they control course and distance: *Simms v. Baker*, Cooke, 146; *Whiteside v. Singleton*, Meigs, 207. Nevertheless a line run according to course and distance may control a call for natural objects, though called for as limiting objects, if such line was actually traced by the compass, and actually marked and fixed

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by the surveyor as the boundary, and so proved in the trial: *Massengill v. Broyles*, 4 Hum., 205. In the nature of things, corners are subject to decay, or to be lost in the lapse of years. When some are lost, they are to be sought for by means of the natural boundaries, lines or corners which still remain, and we must take a lost corner to be where it is proved to have been by these data, although the place thus ascertained may not agree with the course and distance from the remaining or standing corners. *Hickman v. Tait*, Cooke, 460. So that course and distance are to be resorted to as means of ascertaining boundary when others fail: *Frazier v. Bassett*, 1 Tenn., 297. And parol evidence is admissible to prove the actual marking of a line by the surveyor at the execution of the deed or grant different from the line called for: *Dallum v. Breckinridge*, Cooke, 154; *Dyer v. Yates*, 1 Cold., 136. An actual survey is evidence of the land granted, although the calls of the grant do not cover a part, or, it seems, any part of the land: *Nolen v. Wilson*, 5 Sneed, 337.

In view of these principles of law, it is clear that the jury were well warranted in finding as a fact that the lines of the Bowling land were actually surveyed and marked at the time the grant was issued, at any rate up to the beginning corner of the disputed line, especially as the defendant's plea expressly admits a survey. And as the locative call for the branch would control the call for distance, they might also find that the 13th call ended at the branch, and this whether the call was for 40 or 70

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poles. There is not only evidence to support such a finding, but there is literally no evidence to the contrary.

It is contended, however, that the charge of his Honor, the trial judge, is erroneous in regard to the effect of the plat and certificate of survey as evidence. His Honor said: "That neither entry nor survey is necessary to the validity of a grant. If the grant itself contain such calls as will enable the grantee by reasonable construction to fix it to a certain piece of ground, that is sufficient. But when there has been a survey, and there are discordant calls in a grant, or doubts with regard to boundaries arising from the calls of the grant, the plat and certificate are admissible to show the intention of the State as to locality. Or, in other words, in the absence of satisfactory proof of marked lines and corners, the plat and certificate of survey are evidence of the locality of the grant. The plat and certificate are to be referred to in explanation of the grant, and to fix its true position but not to destroy it."

When the consideration of the question of boundary first came before the courts of North Carolina, it was with difficulty that the courts could bring themselves to depart from the calls of the grant under the rule of evidence that parol proof should not be received to add to or detract from a written instrument, and the law to this day is, if the grant be intelligible on its face, (when the calls are applied to the surface of the ground or to the marked lines and monuments of boundary), it must not be departed

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from. But many mistakes having intervened in making surveys, plats and certificates, and filling up the calls in grants, it was at length permitted to show mistake by proof: *Bishop v. Arnold*, Peck, 366. The court of errors of this State at an early day declined to decide whether a plat annexed to the grant, as the law then required, was an essential part of it: *Reid v. Dodson*, 1 Tenn., 402. The Federal courts, however, held that it was not and if recurred to, it must be for the purpose of explanation, and not to destroy the validity of the grant: *Polk v. Hill*, 2 Tenn., 153. Those courts also held that the plat and certificate of survey might be referred to, to remove any doubt as to boundary which may arise out of the description in the grant: *Dallum v. Breckinridge*, Cooke, 152. And ought to be produced to show upon what entry the grant issued: *Patton v. Carothers*, Cooke, 148. And this court has held that they were admissible in evidence as to locality, when there were discordant calls in the face of the grant, that is calls which appear discordant when applied to the ground as marked lines: *Childress v. Holland*, 3 Hayw., 274; *Roberts v. Cunningham*, M. & Y., 67; *Bell v. Hickman*, 6 Hum., 398. So of an entry: *Smith v. Buchanan*, 2 Tenn., 305. And in the absence of proof of an actual survey and marked lines, the plat and certificate are evidence of the land actually surveyed: *Tate v. Gray*, 1 Swan, 73. A marked boundary will control the plat (*Mayes v. Lafferty*, 1 Head, 60), and the grant itself: *Dyer v. Yates*, 1 Cold., 136.

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The charge of his Honor, the trial judge, was undoubtedly correct under the facts of this case, where the plat and survey were necessarily made evidence by the defendant's plea, and introduced without objection. And we are inclined to think it correct in all cases, in the absence of satisfactory proof of marked lines, where there are doubts in regard to the boundaries arising from the calls of the grant when applied to the surface of the ground, and the natural or artificial monuments. They are records, although no longer required to be attached to the grant.

The defendants having failed as to part of the land claimed by their plea, were properly charged with costs.

The report of the Referees will be confirmed, and the judgment below affirmed.

S. D. CHRISTIAN v. NELSON MYNATT.

1. SALE OF LAND. *Execution. Notice.* To entitle a defendant whose land is being sold by the sheriff under execution, to notice, under Code, section 3042, the defendant must not only be in possession of the land, but in actual occupation.
2. EJECTMENT. *Sheriff's deed.* In action of ejectment by plaintiff under a sheriff's deed to land sold as the property of defendant, it is not incumbent on plaintiff to deraign title.

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3. SAME. *Levy. Imperfect description of land.* A levy is sufficient if those living in the immediate neighborhood will recognize the description."

FROM GRAINGER.

Appeal in error from the Circuit Court of Grainger county. J. G. ROSE, J.

SHIELDS & SHIELDS for Christian.

HENDERSON & JOUROLMON for Mynatt.

TURNEY, J., delivered the opinion of the court.

This action of ejectment was brought in the circuit court of Grainger county. There was judgment for defendant, and plaintiff appealed.

The case has been reported upon by the Referees, and is now before us on exception to their report recommending an affirmance.

The first question is, was the defendant entitled to notice of sale under an order of condemnation from the circuit court?

By an act of 1799, and also of 1855, brought forward in the Code by section 3042, is provided, "If the defendant is in actual possession and occupation of the land levied on, the officer having the execution shall, at least twenty days previous to such sale, serve the defendant with written notice, stating that the execution is levied on said land, and mentioning the time and place of sale, and sales made without the notice required in this section, are void."

Here the levy was made 18th November, 1874,

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the sale in April, 1876. The proof shows that defendant with his family resided in Knoxville until 1877, having left the premises in 1864. In his testimony defendant proves possession in himself of part of the land in December, 1874, but says nothing of occupation by himself. Under the statute possession alone is not sufficient to entitle the defendant to written notice of sale. It must be coupled with actual occupation. In *Orowder v. Sims*, 7 Hum., 259-60, Judge Reese says:

“But it is argued that if the court erred in the particular referred to, still the case should not be reversed, because the record shows that the twenty days written notice to the defendant in the execution required by first section of Act 1799, ch. 14, was not given. But the record does not show that at the time of the sale James C. Kelly, the defendant in the execution, was in possession of the land levied on and sold; on the contrary, the record does show that James C. Kelly had conveyed,” etc.

“The twenty days written notice is only to be given to the defendant in the execution when in actual possession of the land.”

The defense of want of notice because of “actual possession and occupation” is an affirmative one, and the defendant must establish it by proof. In the present case the defendant examines himself as a witness, and only claims undefined possession of part of the land, and allows to pass un rebutted the testimony of others that he did not reside on the land from 1864 to 1877. This being so he was not entitled to notice

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under the statute, and decisions construing it. The language of the statutes leaves no room for construction, as both actual possession and actual occupation must concur to necessitate the notice prescribed. It is unnecessary to pass upon the sufficiency of the notice given.

It is next insisted the judgment should be affirmed because the plaintiff has failed to deraign title. Technically the position is true. But the plaintiff claims under a sheriff's deed to the land, which was levied on and sold as the property of defendant, which deed is produced. On the trial the defendant was introduced as a witness for himself, and proves that he had owned the land, some of it as early as 1827, and some of it since 1855; that he had deeds and grants for the whole of it. It is also shown by pleadings in another cause in the chancery court that he claimed to own the land, and defined the character of his title. This testimony was admitted without objection, was acted upon by the court below, and it is too late to make a question here. As the plaintiff claims under the defendant, and the defendant admitted and proved a good title in himself up to the time of the execution sale, it was unnecessary to deraign a title in the defendant. The rights of none except the parties to this suit can be affected by the course adopted. If the conduct of the defendant in admitting and swearing to the genuineness of his own title has had the effect to give validity to plaintiff's claim under a sheriff's deed, he cannot be heard to complain.

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It is unnecessary to consider the question of champerty raised as to deed of Mynatt to Cocke & Henderson, as there is nothing to show the deed was registered before the levy and sale under it, therefore it is not such an outstanding title as will affect the plaintiff. It only strengthens the testimony of the defendant that he had owned the land.

It is further argued, that the levy does not sufficiently describe the land. The description is "two hundred acres of land, the property of the defendant, lying in the 8th civil district of Grainger county, on the dividing line between Knox and Grainger counties, adjoining the lands of Joseph Mynatt's heirs, Martha Smartt and others." Whether this of itself is or is not a sufficient description, it is not necessary to determine, as there is full proof that the land is well known in the neighborhood by it, that it is the only land ever owned there by the defendant, and can be easily proved and located by the description. That although the Joseph Mynatt heirs and Martha Smartt did not own the lands lately before the levy, still such description is well understood and recognized, and there is nothing materially conflicting with this view. In Freeman on Executions, p. 281, it is said, "A levy is sufficient if those living in the immediate neighborhood will recognize the description." In *Parker & Collier v. Swann*, 7 Hum., 80, the levy was "levied on the right, title, claim and interest that John Doak has in and to seventy acres on the waters of the west fork of Stone's river," this was held sufficient, Judge Green saying, "All that is necessary in the levy

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is some general description that will by reasonable intendment connect it with the sale and deed, so that a tract of land different from the one levied on may not be sold and conveyed. This, we think, is given in the levy before us."

For the errors of law indicated the judgment is reversed, and judgment for plaintiff.

THE STATE v. EMANUEL MILLER *et. al.*

LIEN OF RECOGNIZANCE. While since the Code of 1858 no statute of England is in force in this State, yet the principles and rules of law which may originally have grown out of the provisions of ancient English statutes, and been adopted as rules of property and settled principles of law, were not annulled by the Code of 1858, and this court, prior to 1858, having under such statutes declared that recognizances were liens in the county where taken, this law is still in force, but the lien does not extend beyond the county where the recognizance was entered into.

FROM UNION.

Appeal from the Chancery Court at Maynardville.
W. B. STALEY, Ch.

J. L. ROGERS and ATTORNEY-GENERAL LEA for the complainants.

WASHBURNE & TEMPLETON and HENDERSON & JOUROLMON for defendants.

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FREEMAN, J., delivered the opinion of the court.

This bill is filed by the State to enforce the lien of a recognizance.

The defendants, in 1880, became bound in the form of a recognizance of record in the circuit court of Claiborne connty for the appearance of certain parties, at next term of the court, to answer the State in several cases in which they were charged with felonies. There were four undertakings in as many cases in the sum of \$1,000 each.

The parties failed to appear, and judgments *nisi* had; as is our practice, *sci. fa.* issued to show cause why these judgments should not be made absolute, and no defense being made, the same was done; after this an execution issued, which was returned *nulla bona*. In the meantime, after the recognizances had been entered into, but before final judgment rendered on the same, Emanuel Miller, the surety, conveyed the land sought to be subjected in this case to his brother and co-defendant, Pleasant Miller, who now holds it. It is not averred that this conveyance was fraudulent, or made with the purpose to prevent appropriation of the land to meet this obligation.

This bill is filed to enforce the assumed lien on the land created by the recognizance of record. The land does not lie in the county of Claiborne where the recognizance was taken, but in the adjoining county of Union.

An equity is sought to be raised against Pleasant Miller, the purchaser, on the allegation that he was

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present in court when his brother, Emanuel Miller, was examined touching his ability to respond to the obligations entered into, and heard him qualify as surety on the basis of owning this land in Union county. This, however, we take it, does not materially affect the legal questions raised.

The bill was demurred to, and the demurrer overruled, from which there is an appeal to this court.

Two questions are raised, and very earnestly urged for reversal of this holding.

First. It is insisted, that no lien exists since the adoption by enactment of the Legislature of the Code, which took effect May 1st, 1858, and especially by virtue of section 41 of said Code, providing that all public and general acts passed prior to the present session of the General Assembly, all public and special acts, the subjects of which are revised in this Code, except acts creating special courts, subject to the limitations and with the exceptions herein expressed, are hereby repealed." We need not notice the exceptions and limitations referred to, as they have no bearing on the question.

Second. It is insisted, that conceding a lien does exist, it does not extend to lands owned by the cognizor beyond the county in which the recognizance is taken, simply by virtue of the recognizance.

Both these questions are of interest, and neither, in the form presented, have been raised or decided in any case by this court. It was held in the case of *State v. Wynne*, 3 Sneed, 393, and in 3 Head, 173, that a recognizance fixed a lien on the lands of the

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cognizor from the time of its acknowledgment of record. This was, however, before the adoption of the Code, and the land held bound in these cases lay in the county where the recognizance was taken. The question of what is the effect of the Code legislation, and whether the effect of a recognizance, assuming the lien to still exist, is to extend beyond the county where the same is taken, are phases not passed upon, and are now to be considered for the first time.

The argument on the proposition that no lien exists, since the Code is based on the proposition that by the ancient common law, neither a judgment, recognizance, or any like form of liability, created any lien upon lands, but this effect was given in England by several statutes enacted by Parliament, some or all of which were held in force in our State before the Code. It is then insisted that since the Code no statute, except such as are therein provided for, are in force in this State, therefore the decisions based on the law, as founded on these English statutes, are not authority—on the contrary, it is maintained that no such lien being given by the Code, none exists.

The fact is, that no lien did exist at common law by virtue of a judgment or recognizance. The statute merchant was given by 11th Edward I., and amended by 13th of same reign, and the recognizance in the nature of a statute staple by 23 Henry VIII., ch. 6, and are said all to agree in this, that they are recorded acknowledgments of a debt, which not being paid at a certain day, the sheriff is authorized to deliver the lands, as well as the goods of the

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debtor, to the creditor, "by a reasonable *extent* to hold them until such time as the debt is wholly levied." See Cross on Levies, Law Lib., top page 129. And this liability was held to fasten on lands which the debtor had at the time of its acknowledgment, though he should afterwards sell them, and to all after-acquired lands. *Ibid*, 2 Bac. Abr., 698. The lien was by construction of the courts not expressly given by statute. Out of these enactments most certainly came the rule declared by the courts of a lien fixed on the land, such as was approved by this court in the cases of 3 Sneed and 3 Head's Rep. No reference is had to these statutes in those cases, but they are based on North Carolina cases, which adopt the English rule derived from the construction of these statutes referred to by the courts of England.

The question whether since the Code any statute of England, as such, is in force in this State depends upon a fair construction of the Code in relation to the law as it then stood, and what is enacted by it, as well as its general intent and scope, as shown by the enactment itself. The act of 1715 was adopted from North Carolina, by virtue of Article II. of Constitution of 1834, providing "that all laws and ordinances now in force and use in this State, etc., shall continue in force and use until they expire, be altered or repealed by the Legislature."

That act provided, section 6: "The common law is and shall be in force in this government, except such part in the practice in issuing and return of writs and proceedings in the court of Westminster,

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which, for want of several officers, cannot be used.” Section 7: That “all laws of England providing for the privileges of the people and security of trade, as also all statute laws made for the limitation of actions, and preventing vexatious lawsuits, and preventing immorality and fraud, and for confirming inheritances and titles of land, are and shall be in force here, although the plantations are not named.” By the act of 1778, section 2: It was provided substantially “that such parts of the common law as was heretofore in force, and the acts of the late General Assemblies not inconsistent with or repugnant to the freedom and independence of the people or the form of government established, were to continue in force.”

Under these statutes, it was held the statutes contemplated as in force were those passed before the fourth year of James I., 1607, when the charter of the Colony was granted. See N. & C., 438; 1 Tenn., 154. Under these provisions many English statutes were held by the courts in force as statutes in Tennessee, a list of which will be found in a note by Judge Cooper to case of *Glasgow v. Smith & Blackwell*, Overton Rep., 168-9. Among these we may mention the statute of limitations of 21 James I., except so far as changed by the act of 1715, ch. 27. See App. N. & C., 770. So the law stood at the time of the enactment of the Code.

This body of statutes, as we know, was passed as a whole by the Legislature, the act found on first page being entitled as follows: “An act to revise the statutes of the State of Tennessee,”—the act itself being,

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“Be it enacted by the General Assembly of the State of Tennessee, That the general statutes of the State of Tennessee shall be as follows, to wit:”—then follows the entire compilation known as the Code of 1858.

It would seem that if we stopped here there could be no statute law in the State of Tennessee after this, except such as subsequent Legislatures might enact. It certainly was intended that this Code should contain all the statutes in force in the State. However, to specify more definitely what was intended, section 41 was inserted, expressly repealing all statutes previously passed, and all public and special acts the subjects of which are revised, with the exceptions therein specified.

The statutes we have cited from, N. & C. revised, had been passed, and were public and general acts, passed prior to this enactment. By these acts certain English statutes were adopted as in force in this State. But these acts of our Legislature are definitely repealed by the Code we have cited, and no like enactment made, nor are they included in the exceptions found in section 41.

It follows necessarily that all laws which adopted and kept in force any English statute previous to this time, as a statute of the State of Tennessee, being repealed, and a new body of statute law having been compiled and enacted, embracing all the subjects of our former statute law, no statutes were to be henceforward in force except such as are provided for. For instance, the statute of James, as well as other provisions of our statute of limitations of personal ac-

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tions, was in many respects changed in the Code. No one has ever doubted but that the Code contains all our law on this subject.

For these reasons we have no doubt of the proposition, that no English statute as such is in force in our State since the Code.

But while we have no doubt on this question, we do not think it follows that all principles and rules of law that had been adopted by our courts, that may originally have grown out of the provisions of ancient English statutes, are necessarily to be held as swept away, or abrogated as established law among us.

This is well illustrated in the doctrine established by numerous cases in our State, that a resulting trust, where one pays the money for land, and the title is conveyed by his request to a third person, shall be subject to execution at law, the lien of the judgment attaching to it. See *Smitheal v. Gray*, 1 Hum., 491, with the cases cited in Judge Cooper's head note.

This principle came originally from the statute of 29th Charles II, ch. 3, sec. 10, which empowers "sheriffs, etc., to make and deliver execution upon any judgment, statute staple or recognizance, of all such lands, tenements, etc., as any other person or persons shall be seized or possessed of in trust for the party against whom execution shall be served, like as if the party had been seized of such lands, tenements, etc., of such estate as they be seized of in trust for him at the time of said execution sued." See Statutes cited; Cross on Liens, top page 131; *Shute v. Harder*, 1 Yer., p. 8.

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Numerous cases since the Code have adopted the principle thus introduced into our law, it having become a settled rule of property long recognized. But this no more went on the idea that the English statute was in force, or involved it, than does the fact that a large mass of our law as familiarly administered in our courts, especially our courts of equity, is derived from the Roman law, involved the proposition that the civil law as such is in force to any degree in our State.

So we hold the cases referred to in 3 Sneed and 3 Head have announced a rule of law originally derived from old English statutes, or resulting from them by construction of the courts, but which have been adopted as rules of property and settled principles governing this question, as rules of law in accord with sound public policy, and therefore should not be disturbed or abrogated, or overruled, except on the same principles, and for the same reasons we would overrule any other rule of law heretofore announced by this court. We see nothing in the rule contravening sound policy so far as the rule has been heretofore applied in fixing a lien on the lands of a cognizor situated in the county where the recognizance is taken. It is a record liability openly and publicly entered into, under circumstances of such notoriety, and so accessible to all citizens of that county, or any person seeking to purchase the land of the cognizor in that county where the title will naturally be examined, that it cannot operate to the injury of any one who will exercise reasonable prudence in such ex-

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amination. We see no cause to change this rule, and therefore hold a lien does exist as held in the cases referred to.

As a matter of course the principle we have stated is to be confined to such rules and decisions of our courts as have heretofore been announced, and have become a part of our own jurisprudence, not as British statutes, but as part of what well may be termed our own common law. Such rules should not be extended beyond the principles which underlie them, and stand on the ground of having become established rules of law and property.

This brings us to the question, whether in view of the general provisions of our law on like questions, as well as sound policy, it should be held that this lien shall extend to all lands held by the cognizor in any other county in the State, as well as those owned by him in the county where the recognizance is acknowledged. While no limitation of the lien was announced in the cases cited, none were required, as the land lay in the county where the recognizance was taken, and any expression of opinion as to whether it would attach to lands in another county would have been *mere dictum*, and not decision.

The question then is, shall the rule be extended farther than it has gone heretofore, so as to reach lands owned by the cognizor in another county, it may be in a distant county from that in which the record liability is created?

The analogies of our law and sound public policy are proper guides to the conclusion to be reached.

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Our registration laws, and the liens given in cases of judgments of courts of record furnish the nearest resemblance to the question to be decided.

By our registration laws, conveyances of lands or fixing liens on lands, are required to be registered in the county where the land lies, unless it lies in two or more counties, and then it may be registered in either. Where the conveyance contains several tracts in different counties, it must be registered in each county where the land lies. Code, sec. 2032. If registered in a county contrary to these requirements, it is a nullity, and gives no notice. The reasons for these requirements are, that charges upon land should be recorded and found in the place where they would naturally be looked for, and the public inconvenience would be great if it was required that every county in the State should be examined for such charges.

In case of judgments and decrees of courts of record obtained in the county where the debtor resided at the time of their rendition, they are a lien upon the debtor's land from the time the same are rendered. Sec. 2980. But if rendered in any other county than that in which the debtor resides, the lien takes effect when a certified copy of the judgment or decree shall be registered in the county where the debtor resides, if he resides in the State, or if not, then in the county where the land lies. Sec. 2982.

Where the lien is to be fixed on equitable real estate, it must be registered in sixty days in the register's office of the county where the real estate is situated. Sec. 2984.

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All these provisions indicate the policy of our State to be, that liens and charges on land, of record, shall be evidenced by a record at the locality where it would be most natural they would be searched for, and where least inconvenience will follow to parties seeking such information.

The reasons given by Judge Overton, in the case of *Glasgow v. Smith & Blackwell*, 162, Coop. Ed. Overton's Rep., why a judgment should not bind lands outside of the county where rendered apply with peculiar force to the question now under consideration.

After referring to the fact that our people, both as citizens and as witness and jurymen, habitually attend our courts, and thereby have knowledge of their proceedings, and that constructive notice ought not to be extended unreasonably; he asks, why ought a judgment be extended beyond this? No solid reason is seen to exist. "To oblige a man to examine the clerk's office of any county in the State before he can purchase land in safety is a greater burden than the law of England ever contemplated, or is consistent with the ordinary occupations of mankind." This however would be the burdensome result if we should hold a recognizance, a mere conditional obligation, should bind land beyond the county where given.

The case is much stronger against such a holding than the case of a judgment, because the judgment would be enforced at once by execution; but in the case of a mere recognizance, under our mode of enforcing them by *sci. fa.*, it may be years before the lien thus created shall be rendered certain by judg-

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ment, and so the land may have been sold a dozen times to innocent purchasers; a party might enter into a recognizance in Shelby county, and it bind his lands in the other extreme of the State in Carter; a purchaser in Carter would have no suspicion of such a charge, and would be guilty of no neglect in not searching the records outside of that county, yet he might under the rule contended for lose his land by the lien in Shelby. A sound public policy forbids this extension of the rule beyond what has already been decided. No inconvenience can arise to the State in the future in taking bail, as the party will be received only on the faith of such property as he owns in the county where he enters into the obligation. If he desires to bind his other property he can easily do so by assigning it to others to take his place on the bond. In any event, if other lands outside of the county are to be bound, it should be by legislative regulation, in which provision can be made for notice in the county where the land lies, or otherwise, as may be deemed best. We have no power to guard the public interest by making such regulations, and therefore do not feel authorized to establish a rule that shall require them.

The result is the decree of the chancellor will be reversed, and the bill dismissed.

TURNEY, J., concurs in the result, but does not agree with the reasoning as to English statutes.

King v. Miller.

W. F. KING *et al.* v. G. W. MILLER *et al.*

WILLS. The second and third clauses of the will of Francis King are as follows: "I give and bequeath to my wife Lucy the house and farm and survey pertaining thereto of sixty acres, with cattle," etc. "I bequeath to my children the balance of my perishable property and the farm and fifty acres of land, the lower survey, the place where Thomas Bruce now lives, to be equally divided among themselves." On demurrer to the bill filed by the heirs of said Francis King, after the death of his widow, claiming the lands, it was held "there being nothing in this language or context of the will indicative of a contrary intention, it is clear, nothing more appearing, the entire estate of the testator passed to his wife by the second clause." But it being insisted that the lands set out in said claims is the same, the court being unable to determine as to the fact, overruled the demurrer and remanded the cause for answer and proof.

FROM CLAIBORNE.

Appeal from the Chancery Court at Tazewell. H. C. SMITH, Ch.

J. L. ROGERS and HENDERSON & JOUROLMON for complainants.

F. M. FULKERSON for defendants.

FREEMAN, J., delivered the opinion of the court.

This bill is filed to assert title to certain land or lands, on the part of the heirs of Francis King. A demurrer was filed in the chancery court, which was overruled by the chancellor, from which there is an appeal to this court. The case turns on the construction of the second and third clauses of the will of Francis King, the will made 1839, which are as follows:

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"I give and bequeath to my wife, Lucy, the house and farm and survey pertaining thereto of sixty acres, with cattle," etc.

In third clause he says: "I bequeath to my children the balance of my perishable property, and the farm and fifty acres of land, the lower survey, the place where Thomas Bruce now lives, to be equally divided among themselves."

The argument here is, that the will was made in 1839, that the law then required words of inheritance to convey by devise more than a life estate, and was only changed by the act 1851-2, section 2006 of the Code. There being no words of inheritance in this will it is maintained the wife took only a life estate by reason of this fact, and she not dying until 1883, a short time before this bill was filed, complainant's right to enter then accrued.

This is obviously a mistaken view of the law of wills in this State. It is true the words "grant or devise" are used in the section of the Code referred to, act of 1851-2, but this is found in a chapter evidently referring to deeds and other like conveyances between living parties. The law of Tennessee, adopted from the North Carolina statute of 1784, ch. 22, sec. 11, provided "that any devise shall convey the *entire* estate of the testator in lands, unless the contrary intent plainly appears from the words and context of the will."

There being nothing in this language or context of the will indicative of a contrary intention, it is clear, nothing more appearing, the entire estate of the tes-

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tator passed to his wife by the second clause. If he had a fee simple, that estate passed to his wife.

The act of 1784, section 2164 of the Code, seems to have escaped the attention of counsel as well as the Commission of Referees, the latter arguing to their conclusion upon the theory that the intention of the testator must prevail.

The rule being as we have stated, it is however insisted, that the third clause devising "the farm and fifty acres of land, the lower survey, the place where Thomas Bruce now lives to his children, to be equally divided among themselves," devises the same land given in the other clause to his wife, and this cuts down her estate to a life estate. This may or may not be so. We, however, agree with the Referees, that we cannot, from the face of the will, say whether that given by the third clause is the same land as devised in the second clause. The description is alike in some respects and different in others. In both the land is called the farm, but in the former clause the survey appertaining to it is said to be sixty acres, while in the latter clause it is "the farm and fifty acres of land, the lower survey, the place where Thomas Bruce now lives." This would seem to indicate a different part of his land from that on which he resided, given to the widow.

Inasmuch as we cannot, from the bill, see or know how this is, we affirm the report of the Referees, overruling the demurrer, remanding the cause for answer and proof as to how the facts are. Costs of this court to be paid by appellants.

State for use, etc., v. Manly.

STATE for use of Josiah Grigsby v. A. L. MANLY *et al.*

SHERIFF. *Duty of sheriff under order of sale in attachment proceeding.*

Where order of sale is regularly issued by a justice in attachment proceeding, the officer is bound to sell, though title to the property is disputed, and the plaintiff does not give indemnity bond. The order of the court having custody of the property is complete protection to him in making the sale. If attachment proceedings are irregular, but not void, the sheriff must execute the order of sale.

Statement of case. In an action on sheriff's bond for failure to execute and return order of sale issued by a justice of the peace in attachment proceedings, the officer returned the order endorsed, "I went on to sell the corn, and it was disputed, and I would not sell without a bond." *Held*, the officer could not require indemnity bond in such case, and he was liable.

FROM GRAINGER.

Appeal in error from the Circuit Court of Grainger county. J. G. ROSE, J.

J. K. SHIELDS and J. W. YOE for Grigsby.

HENDERSON & JOUROLMON for Manly.

FREEMAN, J., delivered the opinion of the court.

This is an action brought on a sheriff's bond against Manly, for the default of his deputy, by failing to execute and return an order of sale issued by a justice of the peace, directing him to make sale of certain personal property levied upon by attachment.

The attachment was issued by the justice of the peace on November 20, 1878, based on a debt of one hundred dollars for an attorney's fee, claimed to

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be due from the defendant, Alsup. It came to the hand of the deputy sheriff on day issued, and was levied on a lot of corn, as shown by this officer's return, to which is added "citing the said James T. Alsup to appear instantly before W. B. Mitchell, Esq., on this November 20, 1878."

On the same day judgment was rendered for the one hundred dollars claimed, ordering a sale of the property, which last order was issued 22d November, and came to the hands of the deputy sheriff, who returned it with this endorsement: "I went on to sell the corn, and it was disputed, and I would not sell without a bond." A mare seems also to have been levied on by the same officer, and probably under another writ of attachment, in this proceeding. The order of sale was issued in regular form, describing the property that had been attached, that judgment had been rendered, and ordering the property described sold.

The failure to sell the corn levied on and ordered to be sold is the matter complained of in the declaration. The only excuse for not doing so is the fact stated in the return, which is, when fairly construed, that some one disputed the title of the defendant to the property, and the officer demanded a bond of indemnity, which being refused by plaintiff, he, therefore, declined to execute the order, and sell as he was commanded. The Referees report in favor of a reversal of the judgment of the circuit court, which was in favor of defendants. This report is based on supposed errors of law in the charge of his Honor, the circuit judge.

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In that charge his Honor held correctly that the proceedings in the attachment case were irregular, but not void, and the sheriff could not for this cause refuse to execute the order of sale. This probably was not involved or necessary to the decision of the case before his Honor, as there is no reason given for the failure to sell, nor any shown, except the fact that the title was disputed and the indemnity bond refused. He, however, charged the law against defendant on this point, and instructed the jury they should find for plaintiff, if this was the only reason for failure to execute the order of sale. The defendant not appealing or prosecuting a writ of error, even if there had been error in this charge, could take no advantage of the supposed error.

The real question, however, is on the charge of his Honor on the question of the right of the officer to demand a bond of indemnity in a case like this, that is, where specific property levied upon by an attachment is ordered by the justice of a court to be sold, in satisfaction of the judgment rendered, in effectuation of the lien already adjudged to be fixed on it by the levy of attachment, bringing the property within the custody and under the control of the justice or court.

His Honor held substantially that the officer in such a case, if the title to the property was disputed, might well refuse to sell or execute the order of sale unless a bond of indemnity was tendered. He held, however, that the contest of the title must be one known by him not to be frivolous, but he should in-

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stitute reasonable inquiry into the claim, and if found such as a reasonable and prudent man would act on in his own affairs, he might refuse to proceed without indemnity.

While we may not agree with the reasons given in the opinion of the Referees for the conclusion they have reached, we do agree in the result reported, that is, that under the state of case before us, the officer was bound to execute the order of sale, and is liable for refusal to do so.

It is not a question of original seizure of property, where a different rule might find possibly some justification. The property has already been seized, and is in the custody of the law, under the control of the court. That court renders a judgment for the debt, adjudges the lien of the attachment to have been fastened on the property, and orders the property thus held to be sold by its officer. The order of sale on its face shows authority in the court over the subject-matter, jurisdiction, in other words, and the validity of the order beyond this is not for the officer to decide, nor is the question of a disputed title one for his consideration in such a case. The order of the court having the custody of the property is a complete protection to him in making the sale. He only sells such property as the defendant in the attachment himself has. If he has none, nothing passes as to third parties. We take it there can be no doubt of his plain duty to execute the order. To hold the opposite would be to allow the officer or a party setting up a claim of title to the

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property, without process of law or suit, to practically reverse, or render null and ineffective, the judgment of a court having the custody of property by virtue of its process.

We think the ruling of the court in the case of *Shaw v. Holmes*, 4 Heis., 692, as well as the point then decided, has nothing to do with the case now before us. The writer of this opinion does not concede the correctness either of the ruling or reasoning in that case on the question of a bond of indemnity. But it has no application to this case. That is a case where the officer released a levy of an attachment, or refused to make an original seizure, because the title was disputed, or rather because the defendant in the attachment told him the property belonged to another. This is a case where the seizure has already been made, and the property adjudged liable to payment of the debt, and ordered to be sold for its satisfaction. There is no similarity between them. It is clear in that case the officer was liable, independent of any theory the Chief Justice might hold as to rights against the plaintiff on the bond, as he had the property in his possession, and released it, not on a disputed title, but because the defendant told him it belonged to his brother. The brother made no claim to it. The case was rightly disposed of in its result on this view, and the reasoning of the Chief Justice is not on settled principles authoritative. He certainly made a misapplication of section 3605 of the Code, when he said *arguendo* it authorizes the officer to take judgment by motion against

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the plaintiff in the attachment suit on his bond, should the officer be sued for seizing the property. That section only gives the judgment against obligors on bonds given to indemnify the officers for levying an execution on *attachment*, or for making sale of property so levied on or attached, after judgment against such officer, etc. It is too clear for argument that this section has no application to the attachment bond, but only to a case where a bond of indemnity may have been given to the officer directly in such a case.

We do not see the application of the cases involving the degree of diligence or activity required in an officer in executing process to the question in hand. It is not a case of diligence, or the want of it, but one of refusal to execute an order of court for an insufficient reason. We do not therefore discuss that question, but content ourselves with reversing the judgment for the reasons given and the question stated.

Reversed and remanded.

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JOEL REN v. D. M. DRISKELL *et al.*

1. HOMESTEAD. *Judgment in favor of State.* An execution on a judgment in favor of the State against a defaulting tax-collector, for taxes due the State collected and not paid over as required by law, can not be levied upon the homestead of the defaulting tax-collector.
2. SAME. *Same.* The homestead in such case is exempt from seizure and sale under execution in favor of the State.
3. SAME. *How same must be conveyed.* While, under the act of 1868, the husband may convey the homestead for the benefit of the family, yet he can not divest their interest by any less solemn act.

FROM COCKE.

Appeal from the Chancery Court at Newport. H.
C. SMITH, Ch.

A. S. PROSSER, G. W. PICKLE and W. W. LANG-
HORN for complainant.

W. S. MCSWEEN and Wm. MCFARLAND for de-
fendants.

COOKE, Sp. J., delivered the opinion of the court.

In 1872 a judgment was recovered by the State against the complainant and his sureties as tax-collector of Cocke county, for taxes due the State for the year 1869, which he collected, and failed to pay over as required by law. Execution was issued upon this judgment, under which a tract of land was levied upon and sold by the sheriff, and purchased by the

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respondents, Palmer and Driskell, who, after the expiration of the time for redemption, took a sheriff's deed to the land, and instituted an action of ejectment against the complainant in the circuit court to recover the possession. Thereupon this bill was filed for the purpose, among other things, of enjoining the action of ejectment, alleging that the complainant was the head of a family, was residing upon said land as his home at the time of said sale, and had so continued ever since; that he was entitled to a homestead in the land; that it had been sold in violation of this right, and seeking to have the same assigned to him, and the respondents perpetually enjoined from prosecuting their ejectment so as to interfere with this homestead.

The answer of the respondents denied the complainant's right to homestead in the land upon several grounds, and alleged that if he were otherwise entitled to it, the complainant was estopped from setting up any homestead right, as against them, for the alleged reason that he had induced or encouraged them to become purchasers of the land without asserting any such right, but had indicated to them that he would not set up any claim to homestead in this particular land. A good deal of proof was taken.

The chancellor dismissed the bill, and the complainant has appealed.

While there were other questions presented by the record, the report of the Referees, and the exceptions thereto, present but two questions for our determination. The first and more serious one is, does the

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homestead exemption contained in the act of March 12, 1868, ch. 85, secs. 2 and 3, operate against the State, so as to protect the complainant against a judgment for revenue due the State which he, as tax-collector, failed to collect and pay over as required by law.

This is a question of first impression in this State, and is not free from difficulty. It is a very ancient maxim of the English law that the sovereign is not bound by any statute if he be not expressly named therein, unless there be equivalent words, or unless the prerogative be included by necessary implication: Broom. Leg. Max., 72. *Prima facie* the law is made for the subject and not for the sovereign: *Ib.* Yet this maxim admits of these broad exceptions, that "if a statute is intended to give a remedy against a wrong, the king, though not named, shall be bound by it; and the king is impliedly bound by statutes passed for the public good, the preservation of public rights, and the suppression of public wrongs, the relief and maintenance of the poor, the general advancement of learning, religion and justice, or for the prevention of fraud: Broom. Leg. Max., 73; 1 Bla. Com., 261; 1 Kent's Com., 460. In the United States the same principle has been held applicable to the Federal and State governments: 14 Pet., 315; 12 Bush., 283; 7 Ind., 50. "It would seem," says Mr. Thompson in his Treatise on Homestead, sec. 386, "that an application of this principle to homestead and exemption laws in which the State is not expressly named, would result in the conclusion that

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the State is not bound by such laws, especially where to so hold would contravene rights belonging to the State peculiarly to its political character, such as the right to collect revenue. In many of the States this question is determined by the express provisions of statutes, which declare, in various terms, that nothing shall be exempt from execution where the debt, other than public taxes, is due the State; or where the debt is for public taxes legally assessed upon the homestead or other property; or where the demand is for a public wrong committed, punished by fine. See section above referred to and authorities cited. "But," says the same author, "where the question has arisen in the silence of statutes, with two exceptions, the courts have held otherwise. The Supreme Court of Illinois holds that the statute protects a homestead from sale under a judgment rendered for a fine and costs in a prosecution for a misdemeanor. The same result was reached in Missouri, but under a statute entirely dissimilar in terms. The act in question provided that the homestead therein defined should be "exempt from attachment and execution except as hereinafter provided." There was nowhere any proviso saving debts due the State. The court held, in an ably reasoned opinion by Wagner, J., that "the statute protected the homestead from sale under an execution issued against the surety on a forfeited recognizance, although the debt in such a case was due to the State."

In the Illinois case referred to in the above extract, *Loomas v. Gerson*, 62 Ill., 13, the learned judge delivering the opinion of the court, said: "The ob-

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ject of these laws was to furnish a shelter for the wife and children which could not be taken away or lost by the act of the husband alone. This principle must equally exempt the homestead from sale under a judgment for a fine and cost, rendered in a criminal prosecution for a misdemeanor. The wife is not to suffer for the wrongful act of the husband. The State must submit to the same exemptions of a defendant's property that it imposes upon its citizens." See also *State v. Pitts*, 51 Mo., 133. In Illinois, a statute provided that the bond of a tax-collector should be a lien upon all his real estate situate within the county at the time of filing of the bond. But it was held that a judgment against a *collector* upon a bond which was thus a lien upon his realty, was not a lien upon his homestead. A judgment against a private person was not, in that State, a lien on the homestead of the judgment debtor, and the State was not in respect of its revenue in any better position than was the citizen in regard to the collection of his debt: *Thomp. on Homestead*, sec. 387; 45 Ill., 297. It is proper here to observe that the two exceptions to the ruling, as above stated by the learned author, was the case of the *Commonwealth v. Cook*, 8 Bush, (Ky.) 220, which was subsequently virtually overruled by the same court in the case of the *Commonwealth v. Lay*, 12 Bush., 283; and the case of *Brooks v. The State*, 54 Ga., 36, which was the other exception, and turned upon the point that the exemption claimed operated retrospectively, and was disallowed on the authority of the case of *Gunn v. Barry*, 15 Wall, 610. It is to be

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further observed, that in the case of *Gladney v. Deavers*, 11 Ga., 79, it was held by the Supreme Court of that State that the State was bound by acts of the Legislature exempting certain articles of personal property from levy and sale for debts for the benefit of the wife and children of the debtor, so that they could not be seized and sold under execution for the payment of taxes. Hence there would seem to be really no conflict in the decisions of any of the States upon this question, when there has not been a positive statutory provision prescribing a different rule.

In the case of *Gunn v. United States*, 9 Wall., 659, Mr. Justice Bradley delivering the opinion of the court, said: "It is urged that the government is not bound by a law unless expressly named. We do not see why this rule of construction should apply to acts of legislation which lay down general rules of procedure in civil actions." In the case of *Fink v. O'Niel*, 16 Otto, 272, it was decided by the Supreme Court of the United States that the homestead of a defendant is not subject to seizure and sale by virtue of an execution sued out on a judgment recovered by the United States in a civil action, if, had a private party been the plaintiff, it would have been exempt therefrom by the law of the State where it is situate. In that case the question arose as to whether or not the homestead of the debtor, who was a citizen of Wisconsin, would be exempt under the constitution and laws of that State from a judgment recovered against him by the State. The only constitutional provision was a declaration in the bill of rights "that the priv-

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ilege of the debtor to enjoy the necessary comforts of life shall be recognized by wholesome laws," and it had been said by the Supreme Court of that State, "that in all the enactments found upon its statute books in regard to homestead exemption, the most sedulous care was manifest to secure the homestead to the debtor, his wife and family, against all debts not expressly charged against it. Mr. Justice Matthews delivering the opinion of the court in that case, said: "We have found no case in which the question has been raised, or where there has been any expression of judicial opinion whether the exemption would prevail or not as to judgments in favor of the State; but we do not doubt, from the language of the constitutional and statutory provisions and the rules of construction followed in other cases, that it would be held by its courts, if the question should be directly made, that the State, except for taxes, which are expressly excepted, would be bound by the exemption. And after deciding that in case of executions upon judgments in civil actions, the United States are subject to the same exemptions as apply to private persons by the law of the State in which property levied on is found. The learned judge cites the declaration of Lord Coke, that it had been held in Lord Berkeley's case, Plowd. Com., 233, that the king was bound by the statute *de donis*, 13 Edw. I., ch. 1, and says: "By parity of reasoning based on declared public policy of states, where the people are the sovereign, laws which are acts of preservation of the home of the family exclude the supposition of any adverse public

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interest, because none can be thought hostile to that, and the case is brought within the humane exception that identifies the public good with the private right, and declares "that general statutes which provide necessary and profitable remedy for the maintenance of religion, the advancement of good learning, and for the relief of the poor, shall be extended generally according to their words; for civilization has no promise that is not nourished in the bosom of the secure and well-ordered household."

By the act of 12th March, 1868, above cited, the homestead of any housekeeper or head of a family is exempt from execution or attachment for the debts of any such head of a family or housekeeper; and this exemption applies whether the estate be legal or equitable. The only exception is that it shall not apply as against unpaid purchase-money, nor to contracts entered into before its passage.

By an unbroken current of decisions of this court, it is declared to be the policy of this State that its exemption laws are to be literally construed so as to advance the remedy the Legislature intended to afford: 4 Heis., 288; 7 Heis., 514; 6 Heis., 137, and numerous cases cited; Meig's Dig., sec. 1477.

The exemption of the homestead is not for the benefit of the debtor alone, but mainly for the helpless members of his household, for whom it was the object of the Legislature to provide shelter and means of support. And although the State is not named in the act, we are of opinion that debts due to it as well as to individuals was intended to be and are

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embraced within its provisions; and in accordance with the authorities above cited, we hold that the homestead of the complainant was exempt from seizure and sale under the execution in favor of the State under which it was levied upon and sold.

As to the question of estoppel. The sheriff who levied upon and sold the land, testifies that the complainant directed him to levy upon this tract of land; that he was living on this tract; that he had two tracts of land, but said he would keep one tract to live on. Respondent, Palmer, purchased the land at the sheriff's sale, and Driskell afterwards purchased a half interest from Palmer, who assigned one-half his bid to Driskell, and the sheriff made a deed to them jointly. Driskell testifies that Ren requested him to make this purchase, and stated that if he could get the land sold he could come nigher *getting out* than to sell the other lands. That he has other lands, and said he and his old lady would go back to their old home. The testimony shows that at the time of the sheriff's sale of the land in controversy, the complainant did have one other tract of land, but which he voluntarily conveyed in trust for the benefit of his sureties in this judgment, but in a very short time afterwards, and we think before Palmer transferred a half interest in his bid to Driskell. Nor could the sale of said interest by Palmer to Driskell in any manner aid complainant to get out of his indebtedness, as no part of the purchase-money inured in any way to his benefit. Besides, the testimony shows that at this very time Palmer was in posses-

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sion of a part of this land, and complainant in possession of the other, claiming it as a homestead. To make an act *in pais* estop a party, the act must be shown to have been done knowingly and deliberately, not hastily or unadvisedly: 2 Hum., 270; 5 Hum., 290. Besides, as we have seen, the homestead was intended for the benefit of the family, and while under the act of 1868, above cited, the husband could convey the homestead, we are of opinion that he could not divest their interests by any less solemn act. But be this as it may, we are of opinion the testimony does not make out a case that would estop the complainant himself without reference to any interest of the wife and children. We are of opinion, therefore, that the complainant is entitled to relief to the extent of having a homestead assigned in the tract of land in controversy, and the action-at-law perpetually enjoined so far as interfering therewith.

The Referees came to a different conclusion upon both these questions, and reported that the homestead was not exempt; that the complainant was estopped from setting it up, and that the decree of the chancellor dismissing the bill should be affirmed with costs.

The exceptions to the report will be sustained, and the decree reversed, and relief granted as herein indicated. The respondents will pay the costs of this court. The costs of the chancery court will be equally divided. The cause will be remanded to have said homestead assigned, in accordance with this opinion.

Williams v. Williams.

WILLIAM WILLIAMS v. F. C. WILLIAMS *et al.*

1. WILLS. *Rule in Shelly's case.* Where the testator bequeathed land to trustees for the sole use and benefit of his son J., "and after his death for the like use and benefit of his heirs-at-law": *Held*, within the rule in Shelly's case, and that as the will was made, and the testator died before the act of 1851-2, abolishing the rule in Shelly's case, it should be construed according to the law at the time the will took effect under which J. took the absolute estate.
2. DESCENT. *Legitimation.* A legitimated child inherits as if born in lawful wedlock.

FROM GRAINGER.

Appeal from the Chancery Court at Rutledge. H. C. SMITH, Ch.

J. T. & J. K. SHIELDS for complainants.

J. P. EVANS and JNO. H. CROZIER, JR., for defendants.

DEADERICK, C. J., delivered the opinion of the court.

The bill in this case was filed in 1881 by complainant against the widow, the administrator and heirs-at-law of Joseph Williams, deceased. Its purpose is to have a settlement of complainant's accounts as trustee for intestate, Jos. Williams, who, as well as complainant and others, were devisees and legatees under the will of Etheldred Williams, deceased,

Etheldred Williams died in 1846 or 1847, having previously made his last will and testament, which was

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admitted to probate in 1847, shortly after his death. Other persons were appointed co-executors and trustees with complainant by said will, but in the progress of other litigation, in which all the devisees and legatees of said testator were parties, the complainant was declared sole trustee for his brother, Jos. Williams.

The bill prays that the rights and equities of the parties be declared and settled.

It is also alleged in said bill that said Jos. Williams, before his marriage, became the father of an illegitimate child, the defendant, F. C. Williams, who was legitimated by proceedings instituted by the father in the county court of Grainger county, and that some time thereafter he, the said Joseph, intermarried with Elizabeth Pritchard, who survives him as his widow, by whom he had two children, Jos. E. and James E., all said children being minors.

The two last named children insist they are sole heirs and distributees of said Joseph, and do not admit that complainant as trustee had fully accounted for the funds in his hands.

The defendant, Frank C., insists that by virtue of the proceedings of said county court legitimatizing him, he is entitled to take as heir-at-law and distributee of said father's estate equally with his other children.

The chancellor held that by virtue of the proceedings in the said county court, the defendant, F. C. Williams, became an heir-at-law of said Joseph Williams as fully as if he, said F. E., had been born in wedlock; and that said Joseph had only a life estate in such property as was devised and bequeathed in

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trust for him, and that at his death the same became the property of his heirs-at-law. Several matters of account were referred to the master, and it was adjudged upon judgment *pro confesso* against her, that the widow had no right to dower or a distributive share in said trust property, and from so much of this decree as adjudges the rights of F. C. Williams to take under the will as one of the heirs of Jos. Williams, John H. Crozier, Jr., guardian *ad litem*, and solicitor as aforesaid, prays an appeal.

Mrs. Williams, the widow, also prayed an appeal from the decree so far as it adjudges that she has no right in the property.

Crozier, as guardian, perfected his appeal, but Mrs. Williams did not, and the cause in this court is upon the special appeal of Crozier as guardian of the two minors born in wedlock.

The will of Etheldred Williams directs that his trustees shall hold the place on which he resided (which is further described), for the sole use and benefit of his son Joseph, "and after his death for the like use and benefit of his heirs-at-law." He bequeaths that out of his personal estate, money and debts, his trustees shall hold and safely vest \$7,000 in such manner as shall be deemed best for the like separate use and benefit of his said son Joseph; the interest and profits to be paid to him annually, and this and former devises and bequests, it is stated in the will, make up to the said son Joseph the sum of \$2,500, being the amount bequeathed and devised to each of his other children. There is no limitation over to his heirs-at-

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law in this bequest of \$7,000 to Joseph, as in the case of the real estate.

The Referees held that the defendant, F. C. Williams, takes as an heir-at-law of Joseph Williams, under the will of Etheldred Williams, and recommends an affirmance of the chancellor's decree.

To this report the defendant, John H. Crozier, Jr., guardian as aforesaid, files two exceptions :

First. Because the Referees affirm the chancellor's decree, continuing the estate as a trust estate.

Second. Because the report of Referees affirms the decree of the chancellor making F. C. Williams a legitimated child of Jos. Williams, deceased, an heir-at-law, under the will of Etheldred Williams, equally with appellants.

As to the first exception, it may be answered, that the chancellor's decree does continue the estate devised and bequeathed to Jos. Williams to his heirs as a trust estate, although it is decreed by him "that the said Jos. Williams took a life estate only in said property so devised and bequeathed in trust, and that upon his death the same became the property of his heirs-at-law." And the two legitimate heirs of Jos. Williams, deceased, claim in their answer, under the will of Etheldred Williams, which they admit gives the property in trust for the sole use and benefit of said Jos. Williams, and at his death for the like use and benefit of his heirs-at-law.

As to the second exception, the chancellor does decree that F. C. Williams is an heir-at-law of Jos. Williams, and as such entitled to share with the other

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two children in the real and personal property, and comes within the description of remainderman under said limitation in said will. We do not think there is any error in holding that F. C. Williams is an heir-at-law of said Jos. Williams, deceased, and upon the theory of the decree that said heirs-at-law take under the will, the devise over is to his, Jos. William's, heirs-at-law, and F. C. Williams falls within that description. But in our opinion the devise in the will to trustees to hold for use and benefit of Jos. Williams for life, and at his death for the like use and benefit of his heirs-at-law, brings the devise within the rule in Shelly's case, and vests the estate absolutely in the first taker, and the heirs-at-law of Jos. Williams take the estate directly from him by inheritance. In this will the estate is given to trustees to hold for the use and benefit of Jos. Williams, and at his death the same trustees are to hold the estate for the like use of his heirs-at-law, both estates being of the same equitable character. The will was made and testator died before the passage of the act of 1851-2, repealing the rule in Shelly's case. And it must therefore be construed by the law in force at the time it took effect as a will.

In *Polk v. Faris*, 9 Yer., 231, the rule was defined as follows, adopting the definition of Preston on Estates, as approved by Chancellor Kent:

“When any person takes an estate of freehold, legally or equitably, under a deed, will, or other writing, and in the same instrument there is a limitation by way of remainder, either with or without the in-

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terposition of an intervening estate, of a right of the same legal or equitable character, to his heirs, or heirs of his body, as a class of persons to take in succession, the limitation to the heirs entitles the ancestor to the whole estate."

If, then, under this rule, the first taker, Jos. Williams, took the absolute estate, his heirs take directly from him, and whoever may be his heirs at the time of his death, take the estate.

By formal petition and regular proceedings F. C. Williams was legitimated. "The effect of the legitimation is to create the relation of parent and child between the petitioner and the person legitimated, as if the latter had been born to the former in lawful wedlock": Code, sec. 3642. At the death of Jos. Williams, under the proceedings had, F. C. Williams was as much an heir and distributee of his estate as his other two sons, who were born in lawful wedlock.

We hold, therefore, that in the conclusions of the chancellor and the Referees that F. C. Williams was entitled to share in the real and personal estate of his father, there was no error, and that the exceptions taken to this right must be overruled, and the chancellor's decree to this extent affirmed.

As to the widow's right to dower, and to participate in the distribution of her husband's personal estate, we express no opinion, she not being before this court.

The chancellor's decree and the report of the Referees will be modified, however, in so far as it is held that the estate devised by Etheldred Williams to his

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son Joseph is still held in trust for the benefit of the latter's heirs in conformity to the will of the said Etheldred Williams, and the exception taken to the Referees upon this point will be to this extent sustained. With the modifications indicated, the decree ordering an account will be affirmed, and the cause will be remanded for further proceedings.

The costs of the court will be paid by appellant as guardian as aforesaid.

THE STATE v. J. J. TARVER.

1. CRIMINAL LAW. *Sale of whisky.* Manufacturers of whisky or brandy out of the products of farms or orchards of the State cannot sell by retail within four miles of an incorporated institution of learning.
2. SAME. *Retail dealers.* Sales to persons or customers for the purpose of consumption constitute a retail dealer.

FROM KNOX.

Appeal in error from the Criminal Court of Knox county. M. L. HALL, J.

ATTORNEY-GENERAL LEA for the State.

J. C. J. WILLIAMS for Tarver.

COOKE, Sp. J., delivered the opinion of the court.

The indictment against the defendant in this case was as follows:

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“That S. J. Tarver, on the 9th day of June, 1883 in Knox county, unlawfully did sell an intoxicating beverage known as whisky, and an intoxicating beverage known as brandy, within four miles of an incorporated institution of learning, he, the said S. J. Tarver, at the time being the manufacturer of the said whisky and brandy, and selling the same in quantities not less nor under a quart; and not to be drunk upon the premises of the place of sale, which said sale, as aforesaid, was unlawful and contrary to the statute and against the peace and dignity of the State.”

The court below, on motion of the defendant, quashed the indictment, and the State has appealed.

By the act of 1877, ch. 23, sec. 1, known as the four-mile law, it was enacted “That it shall not hereafter be lawful for any person to sell or tipple any intoxicating beverage within four miles of an incorporated institution of learning in this State, and that any one violating the provisions of this act shall be guilty of a misdemeanor,” etc. By the second section of said act, it was provided “that this act shall not apply to the sale of such liquors within the limits of any incorporated town, nor to sales made by persons having licenses to make the same, at the date of the passage of this act, during the time for which such licenses were granted, nor to sales by manufactories (manufacturers) of such liquors in wholesale packages or quantities.”

It is insisted for the defendant that the sale of spirituous liquors in quantities not less than a quart,

and not to be drunk upon the premises where sold, is a sale in wholesale quantities within the saving of the statute.

It was determined by this court in a case decided at Jackson during the last term, but not yet reported, that the distinction between a wholesale and retail dealer did not depend upon the quantity sold by either, but that sales to purchasers of packages or quantities for the purposes of trade or being resold, constituted a wholesale dealer; and sales to persons or customers for purposes of consumption constituted a retail dealer: *Lowenhaught v. The State*, 11 Lea, 13.

We adhere to that distinction as there taken, and furthermore, are satisfied that while it was the intention of the Legislature to permit the manufacturers whose establishments were situate within four miles of incorporated institutions of learning, to dispose of their products, at the places of manufacture, by wholesale, it was not the legislative intention to grant to them a privilege of selling to customers for consumption which was denied to other persons. We, therefore, hold that manufacturers of spirituous liquors are not permitted to sell the same for purposes of consumption within four miles of an incorporated institution of learning, and are liable to the same penalties as other persons for so doing.

But it is further insisted, that the indictment is bad for the reason that it does not sufficiently negative the idea that the defendant sold said liquors in wholesale packages or quantities. The language of this part of the indictment is: "The said S. J. Tar-

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ver at the time being the manufacturer of the said whisky or brandy, *and selling* the same in quantities not less or under a quart, and not to be drunk on the premises of the place of sale." While the indictment would have been sufficient had this averment been entirely omitted, the saving being a matter of defense, yet as the indictment charged the defendant as being the manufacturer of the liquors, it was necessary, in order to be sufficient, that it should aver that the same were not sold by him as a wholesale dealer, or in wholesale packages or quantities. This is not sufficiently done. The averment "and selling the same in quantities not less nor under a quart, and not to be drunk on the premises of the place of the sale," does not negative the idea of a lawful sale, as this might be true, and yet the liquors in point of fact have been sold to a dealer by the barrel, and carried to another State. Where the act indicated is not in itself necessarily unlawful, but becomes so by its peculiar circumstances and relations, the matter must be set forth in which its illegality consists: *State v. Fields*, M. & Y., 137; *Peck v. The State*, 2 Hum., 84; *Harris v. State*, 3 Lea, 326; *Fletcher v. State*, 6 Hum., 249; *Hall v. State*, 3 Cold., 129.

For this reason the indictment was bad, and was properly quashed. The judgment of the criminal court will therefore be affirmed.

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11L 662
12L 285

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JOHN WEBB v. THE STATE.

1. **PRIVILEGE TAX.** *Manufacturers of Whisky.* Manufacturers of whisky and brandy out of products of farms and orchards in the State, who sell by wholesale, are liable for the privilege tax imposed upon wholesale liquor dealers.
2. **CRIMINAL LAW.** *Indictment.* A count in an indictment which charges that the defendant sold whisky without having first taken an oath not to mix or adulterate, and without giving bond, etc., does not charge two offenses in same count.

 FROM CAMPBELL.

Appeal in error from the Circuit Court of Campbell county. D. K. YOUNG, J.

J. C. J. WILLIAMS for Webb.

ATTORNEY-GENERAL LEA for the State.

DEADERICK, C. J., delivered the opinion of the court.

At November term, 1882, of the circuit court of Campbell county, the grand jury returned a presentment against plaintiff in error, Webb, for selling liquor unlawfully. It contained four counts:

The first count charged that he sold without having first taken the oath not to mix or adulterate, etc., and without having given bond, etc.

The second, for selling and tippling within four miles of an incorporated institution of learning.

The third count charges a sale in less quantity than a quart.

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The fourth count charges a sale by wholesale without having obtained a license.

The jury upon the trial rendered a verdict of not guilty upon the second and third counts, but guilty upon the first and fourth counts, that is to say, the conviction is for failure to take an oath and give bond, and for unlawfully selling as a wholesale dealer without obtaining a license,

The only proof was, that defendant was a manufacturer of whisky from the products of the farm, etc., of the State, and sold a quart, which was not drank upon the premises, but was taken to his home by the purchaser.

It is earnestly insisted that the manufacturer of spirits, wines, etc., from the produce of any farm, garden, etc., in this State, is exempt from the privilege tax imposed on other dealers, by virtue of the act of 1870, Code, section 691*e*, notwithstanding the subsequent acts of 1881, and that both acts may stand together, the later acts only applying to dealers other than manufacturers from the products of the farms, etc., of the State.

By the 46th section of the act of 1881, entitled "an act to provide more just and equitable laws for the assessment and collection of revenue for State and county purposes," etc., it is provided the occupations and business transactions enumerated therein, shall be deemed privileges and be taxed, and not pursued or done without license.

Among these occupations and business transactions are mentioned "liquor dealers, whether liquor be spirit-

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uous, vinous or malt (wholesale or retail)": Acts of 1881, p. 256.

By another act passed at the same session, entitled "an act to provide revenue for the State of Tennessee and counties thereof," a tax is imposed on wholesale liquor dealers of \$150, and taxed also as other merchants. Retail dealers are also taxed as other merchants, and in addition are required to pay a tax of \$150 to \$200: Acts of 1881, p. 201.

We think it is manifest from these acts that all wholesale dealers, as well as all retail dealers, are required to pay the taxes imposed by them. No exception is made in favor of any class of dealers by the acts, and all who deal in liquor, whether they sell by wholesale or retail, are required to obtain license and pay the tax imposed.

But do the facts proved make plaintiff in error a wholesale liquor dealer, as charged in the fourth count? The only evidence of a sale is, that in September or August, 1882, the witness bought a quart of corn whisky from defendant, that the whisky was not drank upon the premises, but carried home by the purchaser.

It would be a very strained construction of this transaction to hold that such a sale is a wholesale transaction. The more reasonable construction of this transaction is that the purchaser bought this quart for his own consumption.

In the recent case of *State v. Lowenhaught* (11 Lea, 13), decided at the last term of this court at Jackson, Judge Freeman, in delivering the opinion of the court said: "What is meant by retailing, is selling by small

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quantities to suit customers, articles which are bought in larger amounts generally." One who sells in this way is a retail dealer, and one who sells in gross, and not by the small quantity or parcel to consumers, is a wholesale dealer.

We are of opinion, therefore, that facts proved do not sustain the averment in the fourth count of the presentment, that defendant did unlawfully sell spirituous liquors by the wholesale, without having first obtained a license to do so.

The conviction, therefore, cannot be sustained upon the fourth count. The jury having acquitted defendant on the second and third counts, it remains only to consider the first count. That count avers that defendant unlawfully and wilfully sold spirituous liquors, etc., without having first taken the oath not to mix or adulterate the same, and without having given bond, etc.

The objection taken to this count is, that there are two offenses charged in the first count, the one failure to take the oath and the other failure to give bond. The obvious answer to this objection is, that the only *offense* charged is the unlawful sale of liquor, and the averment of the failure to give bond and take the oath prescribed, are reasons why the sale is unlawful, but the offense is the unlawful sale, and this is the only offense charged.

It is not analogous to the cases cited, where two distinct felonies were charged in the same count. Nor is there any thing in the objection that the presentment recites a wrong section of the act of 1860, as requir-

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ing the oath to be taken and the bond given. It does aver a failure to take an oath not to mix or adulterate, etc., and also a failure to give a bond as required. The oath and bond are sufficiently described, and it was not necessary even to cite the act which required them to be taken and executed, and such citation might be rejected as surplusage, and the error would not be fatal.

It is further insisted that the presentment should conclude "contrary to the form of the statutes," and not "against the peace and dignity of the State," as in this case. Section 5115 of the Code provides that in no case are the words "force and arms," or "contrary to the form of the statute," or "moved and instigated by the devil," or "other words not essential to constitute the offense, necessary or proper." While section 12 of Article 6 of the Constitution ordains that indictments shall conclude "against the peace and dignity of the State."

We hold, therefore, that the verdict as to the first count was correct, and the judgment will be affirmed.

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JOHN WEBB v. S. C. BAIRD, Clerk, etc.

PRIVILEGE TAX. *Liquor dealers.* A wholesale liquor dealer is one who sells to purchasers in packages or quantities for the purpose of trade or to be resold. A retail dealer is one who sells to persons or consumers for the purpose of consumption.

FROM CAMPBELL.

Appeal in error from the Circuit Court of Campbell county. D. K. YOUNG, J.

J. C. J. WILLIAMS for Webb.

ATTORNEY-GENERAL LEA for Baird.

DEADERICK, C. J., delivered the opinion of the court.

This is an agreed case to test the liability of plaintiff in error, a manufacturer of whisky out of the products of the State, to the payment of a wholesale liquor dealer's license under the act of 1881.

It is admitted that John Webb, a citizen of Campbell county, Tennessee, is a manufacturer of corn whisky out of the products of the State, and sells the same "by the quart and upwards," in said county, not to be drank upon the premises where sold.

S. C. Baird is clerk of the county court of said county, and on 23d day of November, 1882, issued his distress warrant against the said Webb for the sum of \$112.50 and costs, being amount of State and county tax; said sum was paid under compulsion. And

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this suit is brought to recover back the sum thus paid.

It is now insisted that Webb is not subject to said tax, and he is exempt under the act of 1870, Code, sec. 691e, and is therefore entitled to recover back the said sum of \$112.50, and costs of this proceeding; on the other hand it is insisted that the collection was proper under the act of 1881.

Upon the foregoing facts his Honor, the circuit judge, held that Webb was liable for wholesale privilege tax, and was not entitled to recover back the sum paid by him, and adjudged costs against him.

We have held in another case against Webb, opinion this day pronounced, that all wholesale and retail dealers in liquors are liable to the tax under the act of 1881, and that although the liquor may be manufactured out of the products of the farms, gardens, etc., of the State, they are not thereby exempt from tax under sec. 961e of the Code, as the later revenue law of 1881 includes all dealers, and contains no exemptions.

The agreement shows "sales by the quart and upwards," not to be drunk upon the premises when sold. Does this constitute a wholesale dealer in liquor? We think not. In the case of *State v. Lowenhaught*, 11 Lea, 13, the defendant was presented for "selling liquor by the quart, and in larger quantities," not to be drunk upon the premises, upon the idea that he was required to take out license as a wholesale dealer in liquor. The circuit judge quashed the presentment, and upon appeal, this court affirmed the judgment,

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declaring such a sale as alleged "by the quart and in larger quantities" did not charge a sale by whole-sale. So in this case we hold the agreed facts stating a sale "by the quart and upwards," does not sustain the judgment of his Honor, the circuit judge, that plaintiff, Webb, was liable for the wholesale privilege tax as a liquor dealer.

The judgment must be reversed, and judgment rendered here for the plaintiff.

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MAYOR AND ALDERMEN OF MORRISTOWN v. O. C.
KING AND WIFE *et al.*

1. TAXATION. *Assessment.* If the description of land in the assessment for taxation is not sufficient to identify the land the assessment is void; and a sale under such assessment is void; and the defect is not cured by the land being accurately described in the report of sale.
2. SAME. *Same. Tracts not contiguous.* Where several pieces of property not contiguous were assessed in the name of the same person, it was illegal to sell one for taxes assessed upon all.

FROM HAMBLIN.

Appeal from the Chancery Court at Morristown. H.
C. SMITH, Ch.

McFARLAND & DICKSON for complainant.

J. P. EVANS and INGERSOLL & COCKE for defendants.

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COOKE, Sp. J., delivered the opinion of the court.

For the years 1873 and 1874 the complainant assessed for municipal taxation five separate lots or parcels of land in Morristown, as the property of one Curtis Eanes. These lots were assessed together as a whole at a value of \$10,000. They were described in said assessment as follows: One lot on Cumberland and Third South streets; one lot on Cumberland and Main streets; one lot on Cumberland street; one lot on Main street, and one lot and store-house on Main street. The amount of taxes levied upon said lots for the year 1873 was \$41, and 1874 \$80.

Said taxes remaining unpaid the marshal and tax-collector of said town, on the first Monday of January, 1876, after advertising the same for sale. sold one of said lots for the entire amount of taxes which had been assessed upon them all as aforesaid. The complainant became the purchaser at the price of \$131.91, that being the entire amount of taxes, costs, etc., then claimed as due upon all of them.

The lot thus sold and purchased was, as is alleged, the lot described in the assessment as "one lot on Cumberland and Third South street." In his report of sale, the marshal described it as lot No. 3, bounded on the west by Cumberland street; on the north by Third South street; on the south and east by the corporate limits, containing a brick residence, where Curtis Eanes now lives." This sale was confirmed at the April term, 1876, of the circuit court. Afterwards Eanes sold this lot, which contained between

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six and seven acres, to O. C. King, and conveyed the title to his wife during her life with remainder to her children, by name, who were all minors.

This bill was filed, alleging in substance, the facts above stated, suggesting that the complainant may not have acquired the title to said lot, and seeking to enforce the lien for the taxes thus assessed by the sale of the lot so purchased by them at said tax sale.

The bill was demurred to by King and wife, and their minor children by their *guardian ad litem*, upon the ground that the assessment of said lots for taxation, was void for want of any sufficient description of said lots by which they could be identified, and because said lots in question purchased by them had been attempted to be sold for the entire amount of taxes assessed upon all of said lots, they not being contiguous or forming one tract, and because said sale was void. The demurrer was overruled and the parties answered, setting up these, among other defenses, by the answers. The chancellor granted the relief prayed for, and decreed the lot in controversy to be sold for the whole amount of the taxes assessed upon all of said lots, and the respondents have appealed.

By the act of 1813, ch. 98, sec. 3, carried into the Code, secs. 554 and 555, "assessed taxes and the costs of reporting land for sale for taxes, shall be and remain a lien upon all lands and other real estate, * * when they shall become due and payable according to law. This lien shall extend to each and every part of all tracts or lots of land, notwithstanding any division or alienation thereof."

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By section 569 of the Code, it is provided, "that in describing lands assessed, where it can be done, the surveyor's district, range, township, section and sectional sub-division shall be shown. If this cannot be done, the assessor shall adopt the mode of description which will most clearly and conveniently identify the property. Where several tracts or parcels of land, belonging to the same person, *lie contiguous, forming one entire tract*, the whole may be included in one valuation and so extended."

It has been repeatedly held that where the State, or a county or municipal corporation has become the purchaser of land under a sale for taxes assessed, they may waive any claim of title under such sale and come into a court of equity to have the lien enforced by a sale of the land for the taxes assessed upon it: *Mayor and Aldermen of Edgefield v. Brien*, 3 Tenn. Ch., 673; *City of Memphis v. Looney*, 1 Leg. Rep., 288; *State v. Duncan*, 3 Lea, 679.

It is insisted here, however, that the assessment is absolutely void for want of any description of the land by which it can be identified, and also because five wholly separate lots not adjacent or forming one tract, were assessed jointly and as a whole at the value of \$10,000, without placing or assessing its proper value upon each lot as it should have been done. There is no question but that these lots attempted to be so assessed were not contiguous. The Commissioners have so reported, and this part of their report is unexcepted to. There can be no question then, that it was illegal to sell one of the lots so situated for the entire

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amount of taxes assessed upon all. If this were the only objection, however, the complainants might be entitled to relief to the extent of enforcing the collection of its proportionable part of these taxes, according to its relative value by a sale of this lot. But the question recurs, was the assessment void, and if so can a void assessment create any lien that can be enforced? By section 627 of the Code, "to make the sale valid, etc., it shall be sufficient that the land sold lies in the county and is sufficiently described."

In the assessment, this lot or the lot alleged to be this lot in controversy, was described as "one lot on Cumberland and Third South street." By this description alone was advertised and sold, but by the report of the sale an accurate description was given of it.

As we have seen, in describing lands assessed, the surveyor's district, range, township, section and sectional sub-division, where it can be done, is required to be given. Where this cannot be done, the assessor shall adopt the mode of description which will most *clearly* and conveniently *identify* the land. Judge Cooley, in his work on Taxation, lays down the rule to be that in listing the land, it must be described with particularity sufficient to afford the owner the means of identification and not mislead him. A description that would be sufficient in a conveyance between individuals would be generally sufficient: Cooley on Taxation, 282-3.

It cannot be contended that the description by which this lot was assessed, affords any means by which it could be identified. Besides, the record shows

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that three of the lots mentioned in the assessment as belonging to Eanes were on Cumberland and Third South streets, and the same description would apply as well to any one of them as to another. While it is very desirable, in order to make the burden of taxation equal, that the remedies provided by law for the enforcement of the payment of taxes should be sustained by the courts so far as it can be done, consistent with well established principles, yet we are constrained to hold that the assessment in this case was void for uncertainty and created no lien upon the property which this court can enforce. Nor was it cured by the description contained in the report of sale. The demurrer should have been sustained. The consequence is that the chancellor's decree was erroneous and must be reversed. The Referees have so reported. The exceptions to the report will be disallowed and the bill dismissed with costs.

COWAN, MCCLUNG & CO. v. SAMUEL GILL *et al.*

1. REGISTRATION. *Deed of trust.* A deed of trust relates from its registration to its execution, and is valid against all existing and subsequent creditors who have acquired no lien prior to its registration.
2. SAME. *Same. Fraud.* Mere silence of trustee and beneficiaries of the execution of the trust deed and failure to register, will not vitiate the deed for fraud.

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3. **SAME.** *Same. General assignment.* A trust deed executed fourteen months before a general assignment, but not registered until within three months of said assignment, is not void under the act of 1881, ch. 121. The deed is *made* when executed, not when registered.
4. **PARTNERSHIP.** *Surviving partner. Individual creditors.* A partnership is dissolved by the death of a partner, and if the surviving partner purchase goods afterwards and add to the partnership assets, such purchases are the individual assets of the surviving partner, and are first liable to the satisfaction of the individual creditors of the surviving partner.
5. **SAME.** *Same. Commingling assets.* If the surviving partner commingle his individual property with the firm assets, his individual creditors do not thereby lose their lien on the property, but an account will be ordered to ascertain the amount of individual and partnership assets.
6. **SAME.** *Joint and separate creditors.* If a partner is indebted to the firm, or has taken more than his just share of the joint funds, the joint creditors will not be admitted to prove against the separate estate of that partner until his separate creditors are satisfied, unless it be shown he acted fraudulently with a view to benefit his separate creditors.
7. **TRUST DEED.** *Beneficiary may attack. When.* If a beneficiary under a general assignment which recognizes a prior trust deed, file a bill to set aside the prior trust as fraudulent and is unsuccessful, he does not thereby forfeit his right to share in the general assignment.

FROM GRAINGER.

Appeal from the Chancery Court at Rutledge. H.
C. SMITH, Ch.

LUCKY & YOE for complainants.

BENJ. J. LEA, G. W. PICKLE, J. P. EVANS and
SHIELDS & SHIELDS for defendants.

TURNEY, J., delivered the opinion of the court.

On December 23, 1880, Samuel Gill, for the purpose
of securing James T. Shields, John B. Hoyle and

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others, in large amounts in which he was in part indebted, and for other parts some of the beneficiaries were his security, made a deed in trust to a tract of land belonging to himself, to W. S. Shields as trustee, the deed to run twelve months to maturity.

At the making of the deed Samuel Gill was, and had been for some years, a member of the mercantile firm of W. T. Gill & Co. The deed was registered on the 18th of February, 1882. On the same day (February 18), a general assignment was made by Gill under the provisions of the act of the General Assembly of April, 1881, and which was registered on the same day, but subsequently to the deed to Shields.

The first deed was delivered to the trustee, a son of James T. Shields, and by him placed in the safe of Shields & Son, and was unknown, so far as the record shows, to the world except the maker, trustee, beneficiaries and witnesses, until about the time of its registration.

The original bill is filed to avoid the first deed for fraud in fact and law, and because never having been registered until within three months of and in contemplation of general assignment, it and general assignment must be construed as one instrument and as giving preferences, and to that extent void under the act of 1881, forbidding preferences.

After the pleadings were made up and proof being taken, complainants conceived the idea that Samuel Gill owed the firm of W. T. Gill & Co. over \$20,000 at the date of the deed in trust, and on the day of the general assignment about \$17,000, funds drawn

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out of the concern with the consent of his partner, and charged on the books of the firm by the partner; and that while making, and in contemplation of general assignment, and after the death of W. T. Gill, Samuel Gill paid James T. Shields and James S. Gill other sums.

Thereupon an agreement, in lieu of a formal amended bill was entered into, by which complainants allege the facts and claim that in the event the court shall marshal assets as between individual and firm creditors, that they have the right to compel the collection of this sum for the benefit of partnership creditors out of individual assets, and also that the payments to Shields and Gill were void, as giving preferences. Answers are filed denying the indebtedness of Gill and the legal conclusions of complainants.

The Commission of Referees report that the trust deed of December, 1880, was entirely free from fraud in fact, in its inception, and was executed in good faith to secure just debts. This is admitted by complainants in argument.

It is further reported: "The existence of this deed was not made known to a single individual so far as the proof shows, beyond those before mentioned connected with its execution. Samuel Gill says that his son and partner, W. T. Gill, did not know it. This concealment enabled Samuel Gill to continue business with unimpaired credit. A knowledge of its existence would have entirely destroyed his credit. This is conclusively shown by the proof. He continued, however, the ostensible owner of a large and very valua-

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ble farm as well as some other property, all in his possession and apparently unencumbered, and was conducting in connection with his son, for a while and after that son's death by himself, a seemingly prosperous business, maintaining to its fullest extent the high character for business integrity and solvency which he had sustained for many years. His son, James S., one of the beneficiaries in said deed, endorsed for him to others, as did also another of said beneficiaries, and for about fourteen months, this man who was hopelessly involved when said deed was executed, was enabled, because of this concealment and non-registration, to increase his liabilities to a considerable extent over and above all his payments, also to engage in business ventures, as a retail merchant in disposing of the goods purchased of complainants and others, on credit, by which he lost, according to his own statement, \$12,000. If the deed had been made public or had been promptly registered, these things could not have happened. It is said for the defendants, that the *non-registration* of this deed was because of their sympathy for the old man, and to save his feelings, and we do not doubt the truth of this statement, yet we must, under what we understand to be law, conclusively hold them as intending that to which their acts naturally led. They acted deliberately and with a purpose. They knew, or should have known, being near relatives and most of them neighbors, more or less familiar with his business, that he was buying goods on credit. The non-registration was not the result of oversight or accident. By their

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course this wrong was inflicted upon innocent parties who were guilty of no negligence. They had the right to expect the records of the county to show where the title rested of this valuable tract of land, upon the faith of which this man was purchasing their goods on credit, while the mere fact of non-registration might not of itself render the deed void, yet taking all these circumstances into consideration, and we are constrained to hold that as against creditors, said deed is inoperative and void."

We have made this copious literal extract from the report that the first and main question in the case may be distinctly presented.

Do the facts reported constitute such fraud as will avoid the deed? Do they make a case of fraud at all? Before proceeding to the consideration of the question, we deem it due to Samuel Gill to say that we do not understand the facts as showing that after he made the deed in trust "he increased his liabilities to a considerable extent over and above all his payments." On the contrary, we think the proof shows a material reduction, and that he was earnestly and faithfully laboring to pay all, and for a considerable time thought he would be able to do so. He at first positively refused to make the deed, and answered those of the beneficiaries who were urging him to it, that he had ample means to and would pay their debts within the twelve months. Subsequent reverses changed his mind as to his capacity to pay, and brought about his general assignment.

The only grounds upon which it can be insisted

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that the beneficiaries have been guilty of bad faith, is their silence upon the fact that the deed had been made for their benefit and a failure to register. By our law no time is fixed within which registration must be made, and deeds are good as between the parties without registration, but not as to existing or subsequent creditors, *bona fide* purchasers, without notice, or valid liens acquired by contract or legal proceedings.

In *Chester v. Greer*, 5 Hum., 34, it is decided that creditor means a judgment creditor, Judge Turley saying: "On the part of J. M. & J. C. Greenway, who file their bill in behalf of themselves and other creditors of Samuel G. Chester, it is contended that the deed of trust is void as to them for want of registration in proper time, these debts having been contracted before the registration of the deed."

"To this it is answered that though by the provisions of the 12th section of the act of 1831, ch. 90, all deeds and other instruments mentioned in the 1st section of the act and not registered as therein provided, are void as to existing or subsequent creditors, yet by this is meant judgment creditors and not creditors *in pais*."

In *Bridewell v. Cain*, 1 Cold., 303, Judge Wright says: "A purchase if made or trust taken before the judgment existed, does not by reason of the non-registration of the deed become infected with turpitude; and if it be afterwards registered before other creditors acquired liens upon the property embraced in the deed, as to them it takes effect from its date and they cannot call in question its validity."

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Our law authorizing the bringing of suits by creditors without judgment, attacking conveyances as made to hinder and delay creditors does not change or in any way affect the rule established by the cases cited, as the law applies as well to registered as to unregistered deeds

It is next insisted that the conduct of the maker and beneficiaries, in keeping secret the existence of the deed enabled the maker to contract debts upon the faith of his supposed ownership of the property, and that he did so contract and thereby a fraud was practiced upon complainants, who say they would not have extended his credit and would have proceeded to collect the amounts already due them.

So far as the record goes, it appears that nothing was said by any of the parties thereto, of the existence of the deed, none of them made any representations in any way, but remained silent upon this subject.

In the case of *Chester v. Greer*, already cited, Judge Turley says: "It is contended on the part of the creditors that the deed of trust is void on the part of the *cestui que trust*, in this, that it appears that one of them, Samuel Greer, being interrogated as to whether he had a mortgage or trust upon the property of Chester, denied that he had, and asserted that he was solvent and that persons might contract debts with him in safety. It is difficult to justify this conduct on the part of Greer, but still it does not affect his rights under the deed of trust, as the case is presented to our consideration. The complainants, from their own showing, are not in a condition to

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take advantage of this objection, for two reasons: First, they are, as we have already held, creditors *in pais*, having neither judgments against Chester nor liens upon the property conveyed in the deed of trust." After citing authorities to the point, the court proceeds: "These authorities prove that the fact of misrepresentation, although a debt *in pais* may be contracted under it will not vitiate the lien acquired by the mortgage or deed of trust, but that to have that effect a subsequent lien must be acquired upon the same property by the debtor contracting under the mistake, induced by the false information thus communicated to him." "But second: It is necessary to fix the fraud upon the prior encumbrancer that he should be informed of the intention of the person making the inquiry to lend money upon the credit of the encumbered property, for otherwise the fraudulent intention is wanting, and the mere falsehood is not sufficient for such purpose."

Try the present case by these rules. Here no representation has been made, no inquiry by complainants or others. Complainants are merely creditors *in pais*. There has been no denial of the existence of the deed, no assertion of the solvency of Samuel Gill. There were no liens upon the property conveyed in trust, and no contracting under a mistake induced by false representation communicated by defendants.

If the facts that Greer denied having a mortgage and asserted the solvency of Chester, and declared that debts might be contracted with him in safety,

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would not defeat his unregistered trust, for stronger reasons an honest and unprovoked silence cannot be taken advantage of here.

The proof and argument that complainants sold goods to W. T. Gill & Co., upon the faith of the property of Samuel Gill, is met by the stronger one that Hoyle, Shields and others gave to Samuel Gill alone credit upon the faith of his property. In such case the law prefers the individual to the partnership creditor. If this were not so, it is a race of diligence between creditors, all having large debts, and all contracted upon the faith of property.

There has been the advantage to respondents that complainants trusted faith alone, while respondents added to their faith works, and secured their debts by the deed in trust.

The fact that the trustee and witnesses to the deed are nearly related to the parties avails nothing under the facts of this case.

The Referees hold the deed void under second section of act of April 6, 1881, ch. 121, which is: "That any mortgage, deed in trust, or other conveyance of a portion of a debtor's property for the benefit of any particular creditor or creditors, made within three months preceding a general assignment, and in contemplation of making a general assignment, shall be void in the event a general assignment is made within three months thereafter, and the property conveyed by such conveyance shall be shared ratably by all creditors just as that embraced in general assignment."

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As we have seen, the deed in trust was executed and delivered about fourteen months before the general assignment. The moment the deed was signed and delivered the maker lost all control over it, his title to the property passed from him irrevocably under the terms of the deed and for its purposes, and if, as we have seen is the law, an unregistered deed passes title, it must be held to be "made" at the moment of delivery, and registration or non-registration neither makes nor unmakes it. The reasoning in the cases cited as to the efficacy of the deed unregistered applies in force to this question, and is conclusive of it. Such is the holding of Chase, C. J., *In re Wynne*, 4 N. B. R., 23, and in *Hansete v. Harrison*, 15 Otto, 406.

The facts show conclusively that the conveyance was not made in contemplation of making a general assignment, this distinctly appears from the conduct of Samuel Gill, already referred to, when he was approached to make the deed in trust. When Samuel Gill made the deed of December, 1880, it was valid, and any subsequent statutes upon the subject of conveyances could not invalidate it. Rights had already vested under it, and must remain, regardless of subsequent legislation.

Another question arises upon a note executed by Samuel Gill as surviving partner after the death of W. T. The note was something over \$2,700, and for goods bought of complainant. The goods were carried to the store and placed in stock with the goods of the late firm under the management of Samuel Gill.

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It is insisted for complainants that by the act of commingling the two stocks, old and new, they became partnership property, and are first liable to the payment of partnership debts. The chancellor so held, we think, erroneously.

Upon the death of W. T. Gill the partnership was *ipso facto* dissolved. The surviving partner had no right or authority to bind his estate upon new contracts. All the rights conferred upon him as survivor were confined to the winding up and settling the business and estate of the firm, as it was left by the decedent. If he saw fit to buy more goods, and place in store with those on hand, it was on his own account and at his own risk; he became owner as an individual and not as a surviving partner, and upon his insolvency such goods must be first applied to his individual indebtedness: *McGinty v. Flannigan*, 16 Otto, 661.

An account will be had to ascertain the relative values of the partnership and individual goods that proper application may be made of the proceeds to debts.

It is next insisted for complainants, that Jas. T. Shields and Jas. S. Gill were indebted in some amounts to W. T. Gill & Co., and that Samuel Gill was indebted to each of them. That after the death of W. T. Gill, and before the general assignment, the parties settled, and the indebtedness of Gill was used in payment of the debts to the partnership, that therefore the trustee under the general assignment must be made to disregard the settlements, and collect of Gill

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and Shields the amount of their several indebtedness for the benefit of partnership creditors. Samuel Gill had the right to control the debts and assets of the firm in his own way until restrained for misappropriation, and having without fraud used firm assets in payment of individual debts, all persons are bound thereby, and he alone can be held to account. If Gill had collected the money due the firm, and afterwards with the same money discharged a debt due from himself to the same parties, the payment would be good. The same rule applies to an exchange of evidences of debt.

It is claimed that Samuel Gill used of the funds of his firm about \$17,000 in his individual business, and that this should be accounted for as assets of the firm in the payment of its debts.

If the facts are as charged, it also appears that any amount taken out was with the consent of the partner, and charged by him on the books of the firm. It is well settled law that if one partner draw out of the assets of the firm for his own use, with the consent of the other members of the firm, without fraud and without intent to injure creditors, that such funds become at once the individual means of the taker, and are no longer part of the firm estate. In Story on Partnership, Ed. 81, sec. 391, it is said: "It is now the settled rule that when one partner has become indebted to the firm, or has taken more than his just share of the joint funds, the joint creditors are not to be admitted to prove against the separate estate of that partner until his separate cred-

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itors are satisfied, unless it can be shown that in drawing out the money the partner has acted fraudulently with a view to benefit his separate creditors at the expense of his joint creditors." "And it is now an indisputable rule in bankruptcy that where the debt from one partner to the partnership was incurred with the privity of his co-partner, proof by the joint against the separate estate will not be admitted."

The rents in the hands of the receiver derived from the land 'conveyed, under the facts of this case, are incident to the trust, and will be first appropriated thereto. The proceeds of the sale of the land, together with rents, will be applied first to the costs and expenses of administering the trust, including reasonable compensation to the trustee for his own services and attorney's fees, then to the payment of the debts secured, and the remainder will be paid to the trustee under the general assignment.

It is argued for respondents that as complainants have attacked the general assignment to the extent of its recognition of the first deed, therefore they have forfeited all right to take under it. We do not think so. We have lately holden that a beneficiary in a deed of trust may attack other debts secured by it for fraud, and although he fail, still he is entitled to the benefits of the deed.

Respondents' exceptions to the report of Referees are allowed, the decree of the chancellor will be modified as indicated in this opinion, and in all

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other respects affirmed with costs. The cause is remanded for execution of the general assignment.

Upon petition to rehear, TURNER, J., said:

This cause was disposed of at a former day of the term, and is before us a second time on petition "to modify opinion and decree as to rents." The error assigned is based upon an expression that "the rents are incident to the trust," etc.

This expression was used solely with reference to the peculiar facts, and not, as argued, to overthrow the rules:

1. That "A trustee holding the legal title to land under a deed of trust to secure creditors, *but not in possession*, is not entitled to the rents, nor can the same be attached by the beneficiary for the payment of his debt."

2. That "Rents accruing after execution of the mortgage, and before sale, in absence of contract as to same, belong to mortgagor."

3. "That in Tennessee the mortgage is always treated as a mere security for the debt, and when the mortgagee is out of possession, it is the *corpus* of the property, not *its rents and profits*, which constitute the fund for the satisfaction of the debt."

4. That "A mortgagee has no specific lien upon the rents and profits of the mortgage land unless he has in the mortgage stipulated for a specific pledge of them as part of his security."

5. Nor "The general rule that the mortgagee, as against the mortgagor in possession, or those deriving

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title under him subsequent to mortgage, is not entitled to a receiver of rents *pendente lite*."

As we have said, it was not purposed to contravene these general rules, but we did treat them as general rules which are not inflexible, and as such may not and do not apply to all cases independent of their peculiar facts.

The rents did not pass under either the deed in trust to W. S. Shields, nor under the general assignment, therefore the beneficiaries under neither have any lien upon them. They were not impounded by complainants, nor was a lien fixed by their bill.

The facts upon which the opinion and decree rest are as follows: That part of the bill on which complainants rely for the position that they impounded the rents or fixed a lien, is in the prayer, "That a receiver be appointed, *or that* W. D. Gammon be compelled to take possession of said lands and collect the rents and profits thereof, and that when the same are collected, they be also distributed ratably among the creditors of said Samuel Gill. That said W. D. Gammon be requested to at once comply with the law by taking the oath, and giving bond as such trustee, or that he be removed and a new trustee appointed in his place, and they further pray that unless the said W. D. Gammon at once comply with the law in this respect that a receiver be appointed to take charge of, manage and control the assets covered by said assignment until a new trustee be appointed."

Gammon was the trustee under the general assignment. He gave bond and took the oath.

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To this bill answers were filed. The answer of Samuel Gill, as appears per the rule docket, as well as from the official endorsement on the original, which is exhibited with the answer to the petition, and by the certificate of the clerk and master, was filed July 15, 1882, instead of 25th, as stated in the petition.

In that answer Samuel Gill says: "In answer to so much of the bill as seeks to take the lands conveyed to W. S. Shields out of the possession of this respondent, and place them in the hands of a receiver, this respondent says, when said deed in trust was made, it was considered that the land, should the respondent fail to pay the debts as provided, would sell for an amount sufficient to pay all the debts secured over the expenses of the trust, when the property was offered for sale by the trustee, having been first most extensively advertised, but few persons attended, only one of whom came with the intention of bidding. This was, as is highly probable in the main, the result of the cloud cast upon the title by the bill of complainants.

The trustee, under the circumstances, declined to offer the property for sale. This has involved so much delay, whereby interest has hereby accrued, and so much expense, with the possibility of further indefinite delay, and so effected the title, this respondent now verily believes that said land is not an adequate security for the payment of the said debts, accrued and accruing interest, expenses and costs accrued and accruing. When it became manifest that these delays would impede the execution of the trust, and that their

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additions to the charges upon the property would be made, this respondent agreed with the beneficiaries under the deed to W. S. Shields, that saving his right to a support under the exemption laws, he would not resist an application for the appointment of a receiver on their part, and he now so agrees, submitting to the court the question of his rights," etc.

"And being advised that under said instruments and the facts of the case, that complainants, on their application, are not entitled to have a receiver appointed, he resists the same."

A notice was given by Cowan, McClung & Co., that they would, at chambers, apply for the appointment of a receiver on June 17. This was abandoned upon the agreement that J. T. Shields would see "that the wheat crop shall not be disturbed or disposed of until the application hereafter agreed upon to be made shall be disposed of. It is agreed that said application may be continued until the second day of the chancery court at Morristown, to be held beginning on the third Monday of July next, and then to be tried and disposed of by the chancellor, or person holding said chancery court, or a motion for a receiver may be then made by any party or parties entitled in said cause, if they so desire or elect without further notice to any person, and then to be disposed of and decided," etc.

The parties went before the chancellor at Morristown and the following order was made: "Came complainants, Cowan, McClung & Co., and moved for the appointment of a receiver to take charge of the rents,

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etc., on the lands mentioned in the pleadings, to hold, collect and receive and sell same, and then came J. T. Shields, J. B. Hoyle and Jas. S. Gill, and also moved for a receiver to take charge of, receive and sell rents of lands mentioned in the pleadings, and all parties having had notice of these applications, and it being admitted and also being made to appear, that a receiver is proper and necessary, it is, therefore, by consent of parties, ordered and adjudged that W. S. Shields be appointed a receiver to take charge of, collect and receive and sell all the rents on * * now accrued or accruing for present year upon the lands mentioned in the pleadings," etc.

After ordering a sale, the order proceeds: "Said Shields shall hold the proceeds of the said rents subject to the order of the court on final hearing of this cause, and by like consent it is ordered that said proceeds of the said rents, etc., shall abide by and be controlled as to this application and disposition by the final adjudication in this cause, it not being intended to prejudice the rights of any one as to their rights to receive said funds."

This consent order was made on the 18th of July, three days after the answer of Gill had been filed, and we must presume it was before the court and seen and considered by the parties or their solicitors.

As we have seen, the prayer of the bill was in the alternative, the condition was complied with, and so far the application was necessarily at an end. The bill asks for no attachment, injunction or any other process by which to impound the rents or fix a lien

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upon them, so that under the several rules relied on the mortgagor was the owner and might dispose of them as he pleased; he had agreed that the beneficiaries under the first deed might have them placed in the hands of a receiver to be applied to their debts.

A receiver of the rents and profits may be appointed *pendente lite* when the mortgage is insufficient and the party personally liable is insolvent: Jones on Mortgages, vol. 2, sec. 1516.

It is a maxim that a man may voluntarily and lawfully do that which a court of equity would compel him to do. In this instance Samuel Gill was insolvent and personally liable for the debt. The land conveyed was insufficient to discharge the debt, the mortgagee might have ejected him by proper proceedings, have impounded the rents and forced the appointment of a receiver. He has done away with the necessity for such proceedings by consenting to part with the rents of the lands conveyed for the benefit of the preferred creditors. His answer under oath made a case for the appointment of a receiver for the benefit of defendants, while no case is made for complainants. It has been adjudged that their bill was wrongfully filed, and no complaint is made in the petition of such adjudication. .

The race of diligence was going on between creditors. The defendants were successful in obtaining, by contract, an advantage which complainants failed to take any legal step to secure, even if they could at all have obtained such advantage as against defendants, and which it is unnecessary to decide.

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The application to have a receiver must have been against the mortgagor in possession, before that application was made he had disposed of the property rightfully and without fraud, and there is no pleading attacking that disposition, nor is there anything in the record showing any purpose to defraud complainants in the disposition.

Dismiss the petition.

PETER NILE v. THE STATE.

1. CRIMINAL LAW. *Improper conduct of jury.* If the prisoner may have been prejudiced by the improper conduct of the jury, the law will presume he was.
2. SAME. *Practice.* In criminal cases courts should distinctly charge juries that they must look alone to the testimony adduced in evidence before them on the trial, and should not permit one of their number to communicate to them any facts not deposed to in court.
3. SAME. *Same.* Although it is a dangerous practice, affidavits of jurors as to improper conduct of the jury will be looked to, but with caution.

FROM SEVIER.

Appeal in error from the Circuit Court of Sevier county. J. G. ROSE, J.

G. W. PICKLE for Nile.

ATTORNEY-GENERAL LEA for the State.

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COOKE, Sp. J., delivered the opinion of the court.

The plaintiff in error was indicted and convicted of petit larceny. In support of a motion for a new trial he introduced the affidavit of one of the jurors who tried the case, which set forth the following statement of facts: "That Henry Proffet, who also was one of jurors, stated, "while we were out deliberating about our case," to his co-jurors in substance as follows: "That he had been a juror before in a case against Peter Nile about some fodder; that it was very common for Peter to be in court, or that he was here every few courts with some charge against him, and that he believed he, defendant, ought to be convicted in this case; that Fulton (the prosecutor) was not impeached."

The court overruled his motion for a new trial, and pronounced sentence upon the finding of the jury, and he has appealed to this court. There is no attempt to contradict the statement contained in this affidavit shown in the record, and the only material question to be determined is, was this statement sufficient to vitiate the verdict, and consequently entitle the plaintiff in error to a new trial? It has repeatedly been held in this State that testimony given to a jury after it has left the presence of the court, vitiates a verdict, because it is not given on oath, and is given without the knowledge of those to be affected by it, and who have, therefore, no opportunity of meeting and repelling it. And that testimony was so given may be shown by the affidavit of the jurors: *Dunston v. The State*, 6 Hum., 275; *Wade v. Ordway*, 1 Baxt., 240.

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It has also been held by this court that it is a dangerous practice to set aside verdicts and grant new trials upon the affidavits of jurors, and it will be done with great caution, and should not be extended beyond where it has already been carried: 3 Hum., 159; 9 Yer., 410. And it is insisted by the Attorney-General that this case does not fall within the principle decided in any of the former cases, and should therefore be affirmed.

It is not necessary that the prisoner should show that he was prejudiced by improper conduct of the jury. It is enough that he may have been, and the law will presume he was: *Sam v. The State*, 1 Swan, 63. In the case of *Morton v. The State*, 1 Lea, 493, while the jury was considering its verdict, one of the jurors stated to his fellows "that the prisoner has heretofore stolen sheep, money and other things from his father." Judge Turney delivering the opinion of the court in that case said: "Such conduct on the part of a juror is quite reprehensible, and will always prejudice the accused."

In this case the statement of the juror to his fellow jurors "that he had been a juror in a case against the defendant before about some fodder; that it was very common for Peter to be in court, or that he was here every few courts with some charge against him, and he believed that he, defendant, ought to be convicted in this case," was not only illegal and inadmissible, if it had been offered in evidence, but was well calculated not only to prejudice the defendants in the minds of the other jurors, but from the manner

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in which it is stated, it is plain to be seen that the juror who made the statement was himself influenced by and acting upon it. The words employed here have very nearly the same significance as those used in the case just referred to, and come directly within the principle reprehended in that case. In that case the court further says: "Courts should distinctly charge juries in criminal cases that they must look alone to the testimony adduced in evidence before them on the trial; and should not permit one of their number to communicate to them any fact in his knowledge not deposed to in court. No such charge was given in this case, and while we might not reverse a case for the mere omission to give this instruction unless specifically requested, yet this case does show the importance of the observance of this admonition on the part of trial courts in criminal cases.

There are other questions made by the record, but as they are not likely to recur upon another trial, we deem it unnecessary to notice them further.

For the misconduct of the jury above stated, his Honor, the circuit judge, should have set aside the verdict. The judgment will therefore be reversed, and the case remanded for another trial.

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JOSEPH A. BROWN v. JOHN K. BROWN.

CHANCERY PLEADINGS AND PRACTICE. *Upon remand from Supreme Court.*

Upon the hearing of a case in the Supreme Court upon exceptions to a report, and an order is made remanding cause to complete account, no additional proof can be taken upon the items of the account passed upon by the court without a reference of the question is ordered or permission to further inquire as to the disputed point.

FROM KNOX.

Appeal from the Chancery Court at Knoxville. W. B. STALEY, Ch.

INGERSOLL & COCKE, CORNICK, GREEN & CORNICK,
for complainant.

A. S. PROSSER for defendant.

FREEMAN, J., delivered the opinion of the court.

This case involved an account between complainant as guardian of a lunatic brother. A report had been made by order of the chancellor, some years since, which report was excepted to by complainant, specifically because the clerk and master had allowed the services of John K. Brown, the ward, as a set-off against the expense of his maintenance, pointing out the proof showing the service to have been worthless.

The chancellor on the hearing disallowed this exception, from which decree an appeal was prosecuted to this court. The appeal was heard before the arbitration court, by which the decree of the chancellor

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on this point was reversed, the opinion directing it, delivered by W. V. Deaderick, Esq., discussing clearly this point, and holding said service to be shown by the proof worthless.

The decree following this opinion says: "The court being of the opinion that it is shown by the witnesses who had the best means of information, that the labor of said John K. Brown was worthless, and that his care and maintenance far exceed the rental value of his one-fifth of the real estate, and that Joseph A. is entitled to compensation for the support and maintenance of John K. Brown, etc.; and that the chancellor erred in overruling complainant's exceptions to the report of the clerk and master, the court is pleased to order, adjudge and decree that the decree of the court below is reversed, and the cause remanded, and said Joseph A. then make his settlement."

It must be conceded, that the very question of the value of the services now in controversy, was specifically raised by exception in the court below, that this exception was overruled by the chancellor, and on appeal to this court, the decree overruling the exception was reversed, and on consideration of the testimony the court adjudged no allowance was to be made for these services, because worthless. The language and purpose is too plain for doubt.

The decree simply means a final adjudication of this question, and the effect of remanding to complete the account, is simply to adjudge that it shall be taken leaving out the disputed item.

The Commission of Referees so construed the decree,

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but avoid the difficulty by holding that additional proof had been taken on this question.

This presents the question, whether when a case is prepared for adjudication by reference to the master, and he reports on the facts as then appearing—his report is excepted to and an appeal to this court, where the application is sustained, and the disputed question adjudged, then on remanding the case the party against whom the decree went in this court, can have the question reraised and readjudicated by adding additional testimony, no reference of the question being ordered, nor permission to further inquire as to the disputed point.

We hold the question was fairly adjudicated by the former judgment of this court, and the case being remanded to complete the account, that account was to be taken on the basis of the exclusion of the item thus adjudged.

The principle on which this rests is one of obvious propriety; on the opposite view, there would be nothing attained by the appeal to this court in such case, also the question might still be reopened on the account, and in case like this new testimony could always be had, and so the case practically have no end. Even if referred to the clerk of this court, new proof could as well be taken here as in the court below, acting under the order of this court, which in a case like this, it is but called on to execute.

The result is, the report of the Referees is disaffirmed, and a decree will be drawn in accord with this opinion. Costs to be paid by respondent.

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R. D. MALONE *et al.* v. THE STATE.

CRIMINAL LAW. *Malicious mischief.* If a mere trespasser erect a building on the land of another, having neither right of property or occupancy, the building becomes at once a part of the freehold, and the owner of the land may remove the building without being guilty of malicious mischief, under the Code, sec. 4652, sub-sec. 1.

FROM MORGAN.

Appeal in error from the Circuit Court of Morgan county. D. K. YOUNG, J.

DEWITT & SHEPHERD for Malone.

ATTORNEY-GENERAL LEA and HENDERSON & JOURNALMON for the State. .

COOPER, J., delivered the opinion of the court.

Plaintiffs in error were indicted and convicted for that "unlawfully, wilfully, knowingly and maliciously they did injure, deface, disfigure and destroy a valuable house and building belonging to the prosecutor," said house being worth twenty-five dollars.

The prosecutor says he applied to Mr. McEwen, and also to Mr. Gerding, to buy a strip of land 100 feet square near Oakdale, on the Cincinnati Southern railroad. They told him that the title was in dispute between them, "but gave him power to occupy the land," agreeing to sell to him whichever one gained it. Witness began to build a business house on the

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land. "It was about 150 feet from the depot, and on the land claimed by the railroad company." When he got ready, after a week's work grading the lot, to lay the sills of the house, the defendant, Malone, who was assistant roadmaster in the employ of the company, and Mr. DeCanzo, civil engineer, notified him not to erect the house. Witness worked on until he had got his house ready for the shingles, when the defendant came, under orders from the company, tore the house down, carried the lumber about 100 feet up the side of the mountain, and put it in a pile. This was done without anger or rough language on their part.

The defendants read in evidence a deed of Hunnicutt and wife, executed May 21, 1874, for six acres of land to the railroad company, and proved that the company had been in possession of the land since the purchase from the Hunnicutts, and had erected their depot, tool and section house and water-tank thereon, and had caused the lines of the land to be run, and corner stones to be put up at each of the corners, but had not enclosed it. The land taken possession of by the prosecutor was within the boundary of the land claimed by the company. And the building was removed by order of the company.

The court was requested by the defendants to charge the jury: "If they believed that the prosecutor was a trespasser upon the lands of the company, and that the defendant, without being actuated by malice or wantonness towards the prosecutor, and acting under the orders of the company, removed him as a tres-

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passer, they would not be guilty of malicious mischief." The trial judge refused the request, and charged the jury: "That if the proof showed that the house of the prosecutor was situated upon the property claimed by the Cincinnati Southern Railroad Company, and that the prosecutor was in possession of the same, the defendant would have no right to throw down and remove such house. The remedy of the company would be by the proper civil suit, in which they might establish their right to the property, or to the possession, and thereby remove the trespasser."

The statute under which the indictment was found is in these words: "It is declared to be a misdemeanor to wantonly injure, deface or disfigure any building or figure attached thereto, or the enclosures thereof, belonging to the State, or any county, city, town, or to another person": Code, sec. 4652, subsec. 1. To bring a case within the statute the injury must be done wantonly, and to a building "belonging to another person than the person doing the injury. The statute does not require the injured party to have the legal title to the property, for the character of ownership is of little importance as an element of the offense. It is sufficient to have the right of possession, even if it is temporary: *State v. Mathas*, 3 Lea, 36. But there must be some right of property. And it would be clearly a good defense to the indictment to show that both the title and right of possession were in the party by whom, or under whose order, the act was done. *Dotson v. State*, 6 Cold., 545.

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The proof shows that the injury complained of was committed by order of the Cincinnati Southern Railroad Company, that the company had a proper title to the *locus in quo* under which it had been in actual possession for years, having erected valuable buildings, its railroad, and other works, upon a part of the land conveyed to it, whereby its possession was extended to the boundaries of its deed. The prosecutor had no title nor right of possession to the land, and could acquire none as against the actual possession of the company. He was a mere trespasser, without actual occupancy, for his building was not completed. By the common law every thing affixed to the freehold becomes a part of the freehold, and this law applies with all its rigor to buildings erected on land without permission of the owner of the freehold by a mere wrong-doer: *Childress v. Wright*, 2 Cold., 350. The prosecutor's building, therefore, as fast as erected, became *eo instanti* the property of the railroad company, and might be removed by its order.

His Honor's charge was consequently erroneous. He should have said to the jury that if they found that the house in question was upon the land of the railroad company, and erected without their permission or authority, and that the prosecutor had neither right of property or of occupancy, the company would have the right to remove the building, or cause it to be removed, and would not for so doing be guilty of malicious mischief as charged in the indictment.

Reverse and remand.

Camp v. Railroad.

E. C. CAMP v. COAL CREEK & WINTER'S GAP RAIL-
ROAD COMPANY.

1. PLEADINGS AND PRACTICE. *Exceptions to report.* Upon a petition to take private property for works of internal improvements, the proper time and way to make objections as to want of title, of proper parties, etc., is by exceptions to the report when filed.
2. SAME. *Appeal.* An appeal will not lie from an order directing a writ of inquiry of damages.

FROM ANDERSON.

Appeal in error from the Circuit Court of Anderson county. D. K. YOUNG, J.

HENDERSON & JOUROLMON for Camp.

ANDREWS & THORNBURG and LUCKY & YOE for Company.

TURNEY, J., delivered the opinion of the court.

In November, 1882, defendant in error filed its petition in the circuit court of Anderson county, asking that the right of way over three tracts of land described in the petition, be assigned to it and set apart by metes and bounds for railroad purposes, under the provisions of the statutes. On November 14th, 1882, petitioner moved for an order *pro confesso*, and the appointment of commissioners to assess damages, etc. Thereupon E. C. Camp appeared by counsel and resisted the motion, upon the ground that sufficient

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notice of the filing of the petition had not been given. The motion was refused. In March, 1883, E. C. Camp moved the court to dismiss the petition for want of proper parties, it being urged that the legal owners to parts of the lands were not before the court, as appeared from the petition. Petitioners renewed its motion for the appointment of commissioners to set apart, etc. Both motions were continued to July term, 1883, when the motion to dismiss was overruled, and two weeks time to make defense was asked and refused, and a writ of inquiry to assess damages, etc., was awarded, no sufficient cause to the contrary being shown, from which Camp prayed and obtained an appeal.

The case is before us on motion to dismiss the appeal as premature. The Referees recommend a dismissal.

It is argued that the court was hasty in awarding the writ, after refusing the time asked for in which to make defense, that two days were allowed by law, and the writ was an order at once upon overruling the application for time. The rule allowing two days to plead is not applicable to this case. Chapter 11 of Code, entitled, "Of taking private property for works of internal improvement," and under which this proceeding is instituted, by sec. 1330, provides: "After the requisite notice has been given, if no sufficient cause to the contrary is shown, the court shall issue a writ of inquiry of damages to the sheriff, commanding him to summon a jury to inquire and assess the damages."

The record shows the requisite notice to have been

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given, and that the statute has been strictly pursued as far as the case progressed up to the time of appeal.

If, as argued, some owners of the lands are not before the court, the fact in no way affects those who are, and as in terms provided, "the proceedings will only cover and affect the interests of those who are actually made parties," etc.

Under sec. 1341, either party may object to the report of the jury, and the same may, on good cause shown, be set aside and a new trial awarded." It would seem that under this section all such objections as want of title, of proper parties, etc., may be made. That construing the several sections together, the proper time to make all contests is when the report is filed by exceptions thereto.

The order directing a writ of inquiry is not such final judgment as may be appealed from, and the motion to dismiss is allowed.

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ANDREW TAYLOR v. THE STATE.

1. CRIMINAL LAW. *Copy of indictment to prisoner.* If the defendant in a capital case, after the court at his instance had made an order directing a copy of the indictment to be furnished him; go to trial on the third day thereafter without objection, one of the intervening days being Sunday, he will be presumed to have waived his statutory right to have the indictment two entire days before trial.
2. SAME. *Continuance.* It is not error to refuse a continuance in such a case upon the affidavit of the defendant that "he is informed by his counsel" that a person named, living thirty-five miles from the place of trial, and another person named then in Oregon, knows facts material to his defense, by whom he expects to prove that he is not responsible for the crime charged in the indictment, the record showing that there was sufficient time to have had the testimony of the first witness at the trial, and that the statement as to the other witness was false and fabricated for delay.
3. SAME. *New trial.* It is not error in the trial judge in such case to refuse a new trial, upon the affidavit of the defendant's attorney alone that "he is informed" that an absent witness will depose to a certain conversation between defendant and an associate in guilt on the day of the murder, the affiant not expressing any belief in the information, and the affidavit not being supported by the affidavit of the defendant himself to the fact of such conversation, and of the person who received the information direct from the absent witness.
4. SAME. *Res gestæ.* A conversation between the defendant and an accomplice or associate in guilt shortly before the commission of a murder by them, is not competent evidence on behalf of the defendant. It is no part of the *res gestæ*.
5. SAME. *Discharge of juror.* A person selected as a juror in a capital case may be discharged by the trial judge before the jury is sworn upon satisfactory proof by the State that he had formed and expressed an opinion of the guilt of the prisoner, the latter not objecting to the discharge. And there is no error in permitting the other jurors, who had associated with the discharged juror, to remain on the jury, the defendant not objecting to their retention, and the record not showing that he had exhausted his challenges before the jury was completed.

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6. SAME. *New trial.* It is not error to refuse to delay a criminal trial, or to grant a new trial, upon the suggestion that a witness, who had been examined on the part of the State, would "give important evidence on behalf of the defense," the application not showing that the witness had been subpoenaed, where he was, when he could be procured, nor what he could prove, especially if the defendant consented that the witness might leave.
7. SAME. *Res gestae.* A statement made by the defendant's associate in his presence, and the presence of others, after the commission of a murder that he regretted it, and was forced by the murdered men to kill them, is no part of *res gestae*, and inadmissible as evidence for the prisoner.
8. SAME. *Indictment.* An indictment for murder in the common-law form is sufficient to sustain a conviction of murder in the first degree.

FROM LOUDON.

Appeal in error from the Circuit Court of Loudon county. A. S. RODGERS, J.

HENDERSON & JOUROLMON, D. R. NELSON and W. L. WELKER for Taylor.

ATTORNEY-GENERAL LEA, W. J. CLIFT, CHAMBERS, PRICHARD and MCQUEEN for the State.

COOPER, J., delivered the opinion of the court.

The prisoner, Andrew Taylor, indicted for the murder, on September 14, 1882, of John J. Conway, and found guilty of the crime of murder in the first degree, has appealed in error.

On September 14, 1882, the sheriff of Hamilton county and John J. Conway, his deputy, were in the smoking car of the railroad train in charge of three

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prisoners' bringing them from Chattanooga to Knoxville for a hearing of their causes by this court upon appeal. One of the prisoners was John Taylor, a brother of the defendant, Andrew Taylor, who had been convicted of the crime of voluntary manslaughter, and sentenced to ten years confinement in the penitentiary. Andrew Taylor, and another brother, Robert Taylor, had been waiting a week or two at different points on the railroad, and watching the trains in the expectation that their brother John would be conveyed by rail to this place. They had manifestly conspired together to attempt to release their brother. On the day mentioned, they got on the train at a way station, entered the car in which the sheriff and his deputy were sitting with the prisoners, and took a distant seat. When the train stopped at the next station, Robert Taylor strode up the aisle of the car, with, according to the principal witness, a "steely appearance in his eyes," followed by the defendant Andrew Taylor. Conway was sitting next to, and looking out of the window of the car. One of the prisoners was occupying the same seat, while the other two prisoners were on the seat in front of them hand-cuffed together, John Taylor being nearest to the aisle. When within one step of Conway's seat, Robert Taylor drew a revolver from his pocket, and presented it at his head, saying with an oath, "cross your hands." Before the startled officer could do anything except turn his face towards him, dropping at the same time his left hand from the back of the seat on which it rested, Robert Taylor fired his pistol and killed him, the ball

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passing through the head of Conway. The sheriff, who was sitting on the other side of the aisle two or three seats further on, rose to his feet and presented his pistol at Robert Taylor, saying, "hold on there." At that moment the defendant, Andrew Taylor, fired his pistol at the sheriff, the ball striking him. The sheriff also fired at Robert, but the pistol was struck up by John Taylor, and Robert Taylor then shot the sheriff over John's shoulder. As the sheriff retreated towards the door of the car, Robert and Andrew both again fired at him. Andrew Taylor also continued to snap his pistol two or three times at the sheriff, and when the latter had fallen to the ground, and, as the witnesses say, was pointing his pistol aimlessly around "like a dying man," the defendant gave him a final shot from the steps of the car, which "straightened him out." John was then released, and armed, and the brothers compelled the conductor and engineer to run the train to another station, and made their escape.

The prisoner was indicted for the murder of Conway at the December term of the circuit court, 1882, of Loudon county, in which county the offense was committed. He was afterwards caught in the State of Kansas, and brought back to Loudon on Friday, April 27, 1883. The circuit court was then in session, and the prisoner was at once brought before it, and being without counsel, the court appointed counsel to defend him. The defendant, by his counsel, then demanded a copy of the indictment, which was ordered by the court to be delivered to him. On the succeeding Monday, the cause having been regularly

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reached on the docket, the defendant appeared in person and by attorney, and moved the court for a continuance until the next term, the defendant supporting the motion by his own affidavit. The motion was overruled. The court then proceeded to empanel a jury, and try the prisoner. After he was found guilty of murder in the first degree, the court overruled a motion for a new trial, and passed sentence in accordance with the verdict.

The testimony set out in the bill of exceptions is clearly sufficient to sustain the verdict, and the fact has not been seriously controverted by the able counsel of the prisoner. They rely for reversal upon certain alleged errors in the proceedings, and especially upon the refusal of the trial judge to grant the continuance asked for, or to give time to obtain certain evidence with a view to a possible mitigation of the sentence.

The first point made by the defense is that the record does not show that a copy of the indictment asked for by the prisoner was ever delivered to him, and that the trial was commenced before the expiration of two judicial days from such delivery.

By the Constitution of the State, the accused, in all criminal prosecutions, has the right to demand the nature and cause of the accusation, and to have a copy thereof: Const., Art., 1, sec. 9. And by statute: "Every person indicted for a capital offense, if he is in actual confinement, is entitled to a copy of the indictment at least two entire days before trial": Code, sec. 5204. The constitutional right extends to all criminal offenses: *Moses v. State*, 9 Baxt., 229.

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And the statutory right is imperative upon the courts, unless waived by the prisoner: *Nokes v. State*, 6 Cold., 297. But to entitle the prisoner to the benefit of a failure to furnish him with a copy of the indictment, the record must show that the copy was not furnished, otherwise this court will presume that it was furnished, or that the requirement was waived by the defendant: *Davis v. State*, 6 Baxt., 429. The record in this case shows that a copy of the indictment was ordered to be delivered to the prisoner, and it fails to show that the copy was not furnished. The indictment was in the ordinary form for the particular crime, and no objection was at the trial made to it in any way. When the cause was regularly called three days after the date of the order, the defendant made no objection that the copy had not been furnished, or that he had not received it two entire days before the trial. He might waive both the constitutional and statutory rights, and the presumption would be that he had waived them in the absence of record evidence to the contrary. He may equally waive the rights in part, and the presumption would be that they had been thus waived, unless the record show otherwise. If, therefore, the Sunday which intervened between the order for a copy of the indictment and the trial was a *dies non juridicus*, so that it should not be counted at common law or under the statute, the defendant might waive the objection, and such waiver must be presumed in the absence of any thing in the record to show the contrary. The defendant cannot be permitted to go to trial on the merits without insisting upon his rights,

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and then avoid the result by making the objection for the first time, the additional day being manifestly of no importance for the study of the indictment.

A more serious objection arises upon the motion of the defendant for a continuance of the cause. His affidavit in support of the motion is, in substance, that he is informed by his counsel that a certain person named, who is now in Oregon, can testify to facts material to his defense; and that another person named, who lives thirty-five miles from the place of trial, also knows facts material to his defense, and has not been summoned for the reason that so short a time has elapsed since his arrest. So much of the affidavit as relates to the last person may be at once dismissed from consideration, for he might readily have been summoned in two days, and we hear nothing more of him, although the court was occupied for several days in making up a jury, and several additional days in trying the cause. And, moreover, the testimony of the person was not relied upon on the motion for a new trial.

It was held at an early day in this State, that a defendant in a capital case should not be required to disclose, upon the first application for a continuance, what his witnesses would swear: *State v. Morris*, 1 Tenn., 220. The only reason, as this court has subsequently said, upon which such a rule can be founded is that at the first term the accused may not have had sufficient time to ascertain what and by whom he would be able to prove particular facts, and for that reason he should be entitled to one continuance on an affidavit otherwise sufficient, without stating what his

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witness would prove: *Nelson v. State*, 2 Swan, 482. Whether the affidavit is "otherwise sufficient" is left largely to the discretion of the trial court: *Garber v. State*, 4 Cold., 161; *Cornwell v. State*, M. & Y., 147; *Sevier v. State*, Thomp. Cas., 192. And although the affidavit does show sufficient grounds for a continuance, if upon the trial of the cause it satisfactorily appears that these grounds are false, and fabricated for the purpose of obtaining delay, this court will not reverse because the continuance was not granted: *Porter v. State*, 3 Lea, 496.

The affidavit of the defendant may be conceded as sufficient in so far as it undertakes to excuse the failure to have the witness present at the trial owing to his absence from the State, and the short interval of time since the prisoner's arrest. It says that the defendant expects to prove by the witness "that he is not responsible for the crime in said indictment charged, and knows of no other witness by whom he can prove the same fact." If the affidavit is construed to mean that the witness would prove that the defendant did not actually shoot Conway, then the fact is clearly established by the record, and the testimony was immaterial. And if the meaning be that the witness would prove facts to show that the defendant was not responsible for the crime at all, then the record clearly shows that the statement was false, and fabricated for delay.

The record leaves no doubt, and the fact is frankly and necessarily conceded by the counsel of the defendant in argument, that the defendant is guilty of

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murder. He was present aiding and abetting his brother in killing the deceased, and the proof establishes, beyond a reasonable doubt, that the killing was in pursuit of a common design, willful, deliberate, malicious and premeditated: Code, secs. 4598, 4588. All that the counsel contend for is that the testimony of the alleged witness might have induced the jury to find mitigating circumstances, in which event the court might have commuted the punishment to imprisonment for life. They insist, and, it may be conceded, correctly, that a defendant is entitled as much to evidence which will lessen the punishment as to evidence which will lower the grade of the crime. And they claim that the expected testimony of the absent witness might have had that effect.

This testimony is set out in the affidavit of the defendant's attorney presented upon the motion for a new trial. The affidavit states that he was informed that the absent witness sat on the seat of the railroad car behind the defendant and Robert Taylor on the day of the killing, and heard defendant remonstrating with his brother, protesting against something, the nature of which the witness did not at that time understand, and refusing to do, or take part in something which, though he did not understand, he is satisfied was the rescue of John Taylor, resulting in the killing for which defendant has been tried; and, at the same time, saw Robert Taylor in a violent manner clutch his fist, and shake it in defendant's face, and, with oaths, make him hush, and tell him he had to do it; that he must hush—he had heard as much of that sort of thing as he was

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going to, and would hear no more, and perhaps accused him of cowardice.

The theory upon which this testimony is considered to be important is that the defendant was influenced to join in what was done by his brother Robert, and that the fact might palliate his guilt in the eyes of the jury. The proof shows that Robert was about twenty-five years of age at the time of the offense, and the defendant had about reached his majority. Robert was, however, a hardened criminal, having served a term in the penitentiary, and the argument is legitimate that he was the prime mover in the act in question.

It is to be noted that the affiant does not say that he had heard the statements proposed to be proved from the witness himself. On the contrary, the affiant expressly says that "he was informed" of the facts. It is also to be noted that the affiant does not say that he *believes* the statements, and that the defendant does not offer his own affidavit to the effect that such a conversation did actually take place. The proposed testimony is the hearsay of hearsay, uncorroborated, as it clearly should have been, by the affidavit of the person or persons who received it at first hand from the absent witness, and communicated it to the defendant's attorney, and by the defendant's own affidavit. The trial judge can scarcely be put in error by a refusal to grant a continuance or a new trial upon such an unsupported affidavit.

But if the witness had been present at the time, would the testimony have been admissible? He would be called on to testify to a conversation between the

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defendant and his brother in relation to the act they were about to commit, if we adopt the conclusion or inference of the witness to that effect. The conversation was no part of the *res gestæ*. Declarations to be admissible as part of the *res gestæ*, must be contemporaneous with the act, and tend to characterize it. Declarations explanatory of a previous fact are inadmissible: 1 Greenl. Ev., sec. 108, and notes; *Nelson v. State*, 2 Swan, 237; *Garber v. State*, 4 Cold., 161. Conversations between conspirators before the guilty act, not tending to characterize the act, but only bearing on the relations between the parties, could not be introduced by either, nor proved by a third person, at their instance, who might have casually overheard them. They cannot be permitted in this way to make evidence for themselves.

On May 2, 1883, one W. W. Williams, after qualifying himself in the usual way, was selected as a juror, and remained with the other jurors as selected until the panel was completed on May 4. After the panel was made up, but before the jurors were sworn, the attorney-general, in the absence of the jury, moved to discharge Williams upon the ground that he had formed and expressed an opinion as to the guilt of the defendant. He introduced, in support of his motion, the affidavits of two witnesses that they had heard Williams express the opinion that the defendant ought to be hung, and the affidavit of a third person that he had detailed all the circumstances of the killing to Williams some time after the event occurred, and that Williams remarked that if the defendant was

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caught he ought to be hung without law, or gospel, or judge, or jury. The defendant objected to the sufficiency of the affidavits, whereupon the court asked him if he objected to the discharge of the juror. The defendant replied that he did not object to the discharge of all the jurors. Williams himself, when interrogated by the court on the subject of the affidavits, said that the affiants were respectable and truthful men, and he would not say positively that he had not expressed himself to them as stated, although he had no recollection of having done so. The court then discharged Williams, and supplied his place with another juror.

The facts as shown by the affidavits upon which Williams was discharged would have been sufficient to have sustained a motion for a new trial by the defendant under the decisions of this court, and there was consequently no error in discharging him in advance: *Draper v. State*, 4 Baxt., 253; *Hines v. State*, 8 Hum., 599. No serious argument has been submitted against the propriety of the discharge, but the point is made that the court should have at the same time discharged all the jurors, because of the fact that the incompetent juror had associated with the residue of the panel for two days. No doubt the court might have discharged the entire jury, if, in the exercise of his discretion, he had thought the ends of justice required such action: *Griffie v. State*, 1 Lea, 41. But the question is, whether the trial court was compelled by law to discharge the jury, without more, merely because one of the jury had previously formed and

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expressed an opinion adverse to the defendant? The defendant did not object to the other jurors because of their association with the incompetent juror, nor ask for their discharge, nor offer to show that anything improper had passed between them and the discharged juror. Upon principle, in the absence of any thing else, the mere association of selected jurors with one of their number who had formed and expressed an opinion as to the guilt of the defendant, would no more render them incompetent than such association previous to the trial. And no decision has been cited holding otherwise.

It has been held by this court that the separation of a juror from his fellows, unless satisfactorily explained by the prosecution, is a sufficient ground for a new trial: *Hines v. State*, 8 Hum., 597. The burden of proof is upon the State to explain the separation, not upon the defendant to show actual injury, and the analogy of that class of cases to the case before us has been strongly pressed upon the court. But there is no analogy between the two cases.

A juror who separates from his fellows is guilty of a positive violation of his duty, and thereby creates a *prima facie* case against him, which requires to be met by countervailing testimony. But jurors who simply remain with the delinquent juror are merely performing their duty, and are not thereby put in fault. The burden was, therefore, upon the defendant to show improper communications by their associate, or to establish some fact to create a suspicion against them. Until a *prima facie* case of

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taint is made out, there is no necessity of explanatory evidence.

A real analogy would exist if the separated jurymen were allowed to remain on the jury by the defendant in the full knowledge of the fact of separation, or still better, if the defendant, after the delinquent juror was discharged, failed to except to the other jurors who had associated with him subsequent to the separation, upon the ground of such association. But these points may be said to have passed into judgment. It is well settled that if a juror, incompetent for the reason that he had expressed an opinion, has been selected upon the jury, and the record fails to show that the defendant had exhausted his challenges, the objection is waived even in a capital case: *Presswood v. State*, 3 Heis., 468; *Holcomb v. State*, 8 Lea, 420. The record in this case does not show that the defendant had exhausted his challenges. In *Griffie v. The State*, 1 Lea, 41, after six jurors had been selected and placed in charge of an officer, two of them separated from their fellows, but were brought back, and remained with the others until the court met next morning. The trial judge discharged all the jurors, but made an order that the four jurors who had merely associated with the delinquents should be upon the panel for a new jury. The defendant made no objection to the panel, nor did he object to three of the four jurors when passed to him by the State. The court, however, of its own motion, discharged these three jurors, and a jury was selected before the defendant's challenges were exhausted. The

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court said by Judge Freeman: "There is no reversible error in this question in any aspect of it." In *Cantrell v. State*, 1 Leg. Rep., 193, it was shown, upon a motion for a new trial, by the affidavit of one of the defendant's attorneys, that one Fultz, a juror, when asked in his *voire dire* whether he had formed an opinion, said that he had, and believed defendant guilty, but that the reply did not reach the ear of his counsel until after he had taken his seat. His attention was then called to it by another member of the bar, and no objection was made. Judge Freeman, in delivering the opinion of the court, said: "This cannot aid defendant. He should have objected at once, and presented the facts to the court, when the juror would have been set aside. He cannot remain quiet under such circumstances, and by his conduct accept the juror after the objection comes to his knowledge, especially when the fact is known before the jury is made up or trial commenced, and then have a new trial when the verdict is found against him." Both of these were convictions of murder, one in the first and the other in the second degree. The case before us clearly falls within the principles settled by them.

The bill of exceptions shows that at the close of the testimony in the cause, the defense stated that N. J. Bell, who had been examined on the part of the State a few days before, would give important evidence on behalf of the defense, and asked the court to give them time to get the witness to the place. The application did not show that the witness had been subpoenaed, where he was, or when he could be procured,

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nor what the witness could prove. Of course there was no error in the ruling of the court upon such a showing. In the affidavit of the defendant's attorney used upon the motion for a new trial, it is stated that the attorney had himself permitted the witness to leave the place of trial and go to Knoxville upon his promise to return the next morning, under the expectation that the trial would not close as soon as it did. Bell was the conductor of the train on which the killing occurred, and proved, when examined by the State, that he had stepped off of the cars before the shooting occurred, and that after the sheriff had fallen, he ordered the local agent of the railroad company at the station to go for a physician. After this, he says, he looked around, and saw pistols pointed at him by men standing on the platform of the smoking car, who directed him to start the train. He told the engineer, who was also on the ground, to move away as quick as he could. The witness then stepped on the front platform of the smoking car, and went in behind the men who had pointed their pistols at him. When he got inside, the larger of the men presented his pistol at him, and asked him if he was armed. He replied that he was not, and John Taylor told the other not to hurt the witness as he was his friend. The witness then details what he saw and heard thereafter. During the subsequent conversation, but exactly at what time is not stated, the affidavit for a new trial undertakes to say that the witness would depose that while the brothers had their pistols in their hands, Robert Taylor, in the presence of the

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defendant, said that they regretted having killed the sheriff and Conway, that they did not intend so doing, but the sheriff and Conway forced them to do it.

If this alleged testimony was at all material, the affidavit shows that the defendant failed to have it before the jury by his own fault. But it is clearly both immaterial and incompetent. The expression of regret for a murder amounts to nothing, and Robert Taylor's statement that he was forced to commit the deed by the deceased is falsified by the testimony of all the witnesses. The affidavit undertakes to say that the conversation was a part of the *res gestæ*. But this is a mere conclusion of the draftsman, and a clear mistake. The deed had been done, and the guilty parties could not by what they might afterwards say make evidence for themselves.

The indictment in this case is in the usual common-law form. One of the defendant's counsel insists that the indictment is insufficient to sustain a conviction of murder in the first degree. It is well known that one of our most distinguished writers on criminal law has always maintained the view contended for, and one of the judges of this court has reached the same conclusion: *Poole v. State*, 2 Baxt., 288. But the weight of judicial authority is that as the common-law form of indictment included all grades of murder, the statute dividing murder into degrees only affects the evidence and the punishment, not the forms of pleading: 2 Bish. Crim. Prac., sec. 569, *et seq.*, where the authorities are given, while the learned author dissents from them. In this State, in the

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very act in which the crime was divided into grades, the Legislature expressly provided that the indictment should be sufficient if the offense was charged or described according to the common law, and this provision of the statute was brought forward into the Code, sec. 5119. This court, in the first case which came before it under the statute, where the point was distinctly made and argued with marked ability, held that the indictment in the common-law form was sufficient: *Mitchell v. State*, 5 Yer., 340. And the decision has been repeated from time to time, and uniformly adhered to. We see no sufficient reason for departing from the ruling.

It is contended that his Honor, the trial judge, failed to tell the jury what a conspiracy was, and erred in charging upon lying-in-wait as an element in murder in the first degree. But the defendant was not indicted for a conspiracy, and was indicted for murder in which lying-in-wait may be an element. If there were no lying-in-wait, the charge would do no harm. The second special request only asks what the judge had already charged, that the jury must find that the Taylors "were guilty of lying-in-wait to carry out their common purpose to kill any one who should oppose them." So of the remaining request that if the jury had doubts as to whether the defendant was guilty of one of any two degrees of homicide, they should find him guilty of the less grade. For his Honor had already charged that the jury could not find the defendant guilty of any grade of homicide unless satisfied that he was guilty of that grade be-

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yond a reasonable doubt. Much of the argument submitted to us in behalf of the prisoner was based upon the idea of great popular excitement against the prisoner. But there was no application for a continuance on that ground, nor is there any thing in the record indicating such a state of affairs, or tending in the least to show that the trial was otherwise than fair and impartial.

There is no error in the record, and the judgment must be affirmed.

FREEMAN, J., delivered the following dissenting opinion :

I am compelled to dissent from the opinion of a majority of the court on one question. I think the panel should have been discharged, or a new trial granted, because of the fact, that the jurymen who had formed and expressed an opinion against the prisoner was permitted to mingle with the jury probably for several days, having obtained this position by what presents the gravest suspicion to my mind of corrupt perjury. This party is shown to have been so prejudiced against the prisoner as to authorize his discharge on the facts being presented to the court. He is shown to have said repeatedly in substance that the defendant should be hung without law, judge or jury, thus indicating a most emphatic bias and eagerness to see the prisoner punished regardless of and without the forms of law. I think the refusal to consent to the discharge unless all were discharged, sufficiently raises the question.

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We have held in numerous cases that if the jury are permitted to mingle with strangers, or they are permitted access to the jury, nothing more appearing, a new trial must be had. The principle is, that wherever there has been opportunity for receiving improper influence, the prisoner has a case for a new trial, until the State shall show by proof that no evil influences has been exerted. The fact of contact with others is held sufficient and a plenary ground for new trial, until explained by proof removing the presumption and inference of law showing the jury had not been improperly tampered with.

Concede this to be settled law, as it is by all our decisions, then the question is whether we have a case coming within these established principles? As a matter of course the facts of every case are slightly variant in detail, but the real inquiry is, whether the rule of decision is different as applied to the essential facts in this, and in the cases to which I have referred. The principle is one of public policy, in favor of the administration of justice. If the jury *may have been tampered* with, this unexplained is enough for a new trial.

If the jury have been seen to separate, or one is absent from the others not in care of his officer, or in passing through a crowd in one case, and persons mingled with them in that way, the fatal taint is given, and must be removed. This rule is simple and of easy application. It is that the presumption of taint arises whenever an opportunity and exposure to danger of it is shown. This presumption

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must then be removed by proof, or the verdict is vitiated. Now let us apply this principle to the case in hand. We have here a man infected, as shown, with a most definite and determined bias against the defendant, not simply having a casual communication with the jury, but he is thrown with them in the most intimate relations—is privately with them in their rooms, and sleeps with them for night after night—how it can be said this raises no presumption of taint, I am unable to see, while if the jury had been passing from the court-house to their room, and he had been seen casually conversing with a member of it, would be hopelessly infected until the taint was removed by proof, is more than I am able to see. A sanitary committee who should require parties to be quarentined and disinfected before mixing with their fellow-citizens, who had been in a civil district or a neighboring village where an epidemic prevailed, might be criticised for over-prudence in precaution, and be compelled to justify their conduct on the plea of danger to human life and the importance of taking all precautions against a dangerous infection. But if that same committee were to decide after this that it made no difference at all if parties had freely mingled with, even slept with, a patient who had the small-pox fully developed, or had been for days in a room with a man who had the black vomit, it might possibly be that no infection should result, but the vindication of their consistency, would, it strikes me, be a difficult problem to be solved.

I think this a parallel case. My brethren would

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be bound, under our decisions, to say this jury were tainted if they had mingled with the general mass of the community, where we might assume there existed in all probability a sporadic case of prejudice against the prisoner, but when we find them in contact and intimate association for days with a party actually proven to have been virulently infected with a determined bias against the prisoner, the theory of the opinion, as I understand it, is that this is harmless. Practically it may be true that no jurymen have been infected by the noxious virus, but logical consistency, and a sound adherence to consistency in the application of settled principles demands the same result shall follow in the one case as the other.

It may be argued the jury were in charge of an officer, and instructed not to converse with any one about the case. But so they are in case of mingling with a crowd, or having communication with others; yet this has never been suggested as any cause to change the rule. Can it be that the form in which the mingling shall take place can change the principle that if a jurymen shall separate from his fellows, or be approached and spoken to from without, the taint arises, but if the man is inadvertently turned into their private room, or perjures himself to get his opportunity, and so gets in by swearing he had expressed no opinion, when in fact he had, that this make no difference in the two cases? My brethren are compelled to assume the affirmative on their theory. I am simply unable to see the soundness or logical consistency of that view.

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The facts in this case have, it is true, elements of difference from the cases heretofore, and therefore are not precisely parallel. But the main element of difference is, that this presents a much stronger case of danger of infection from without than our decided cases, and therefore the demand is for a more stringent enforcement of the rule established for the protection of the purity of the jury trials. So I see it—and assuredly such an element can furnish no ground for a relaxation of these rules, such relaxation could only stand on the theory of the more danger the less precaution demanded to guard against it.

It may be the jury could have been purged by showing that no communication with the prejudiced juror was had; it may in fact be that none was had in the case. But I can but think that logical consistency and the unbending application of established principles demands that we should follow these rules to their legitimate results, even at the cost of some delay in meeting out justice to a criminal, be the grade of his crime what it may. To make haste slowly, when the law is to be vindicated, and to be sure its rules shall be felt to be unbending, is, I think, the soundest of policy.

Frankly conceding that I may be wrong, and my brethren right in their views, I am compelled to follow my own judgment, and maintain the right as I see it.

For these reasons, and others that might be given, I think it was the imperative duty of the court, when the juror was discharged, either to have seen that the

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jury was purged from all infection by an examination conducted by him, and if this was not done, then to have discharged the entire panel and summoned a new one, free from an opportunity of being tainted. I therefore dissent on this point from the opinion of the majority of my brethren.

JOHN L. MOSES, Chairman, etc., v. E. J. SANFORD.

DAMAGES. *Ferry and wharf landing. Condemned for county bridge.* Where a small part of a strip of land along a river bank used as a ferry and wharf landing is condemned for the purpose of erecting thereon the pier of a county bridge across the river, the owner of the land is entitled to be paid the value of the land taken, and the damages for the injury to the adjoining land as a wharf landing, but not to the loss by the depreciation of the profits of the ferry franchise by the opening of the bridge; the franchise itself and its exercise not being impaired by the existence of the pier.

FROM KNOX.

Appeal in error from the Chancery Court at Knoxville. W. B. STALEY, Ch.

W. P. WASHBURN, HOUK & GIBSON and J. W. CALDWELL for complainant.

HENDERSON & JOUROLMON and W. M. BAXTER for defendant.

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COOPER, J., delivered the opinion of the court.

The county of Knox having built one of the piers of a bridge across the Holston at Knoxville upon the land of the defendant, he brought an action of ejectment for its recovery, whereupon this bill was filed to enjoin the action. The chancellor, upon final hearing, perpetually enjoined the defendant from prosecuting his action of ejectment at law, but made a reference to the master to ascertain the value of the land taken for the bridge, and the incidental damages after deducting the incidental benefits. Upon appeal, this court affirmed the decree of perpetual injunction, and gave the defendant his option to ascertain his damages for the appropriation of the land for public purposes either in this suit, or at law: *Moses v. Sanford*, 2 Lea, 655. It was thereupon ordered by this court that the cause be remanded "to ascertain the value of the land appropriated for bridge purposes, if the respondent elect to adopt that method of ascertaining the value of the land." The defendant having so elected, the master reported the value of the land to be \$113.55, and the incidental damages exclusive of the ferry privileges at \$250, and with those privileges at \$2,186.45. The defendant excepted to the valuation of the land at \$113.55. The chancellor disallowed the exception, and gave the defendant a decree for the sum of \$113.55, charging the county with all the costs except the costs of two useless depositions taken by defendant, which he ordered the defendant to pay. The Referees have reported that in addition to the actual value of the

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land as given by the chancellor the defendant be also allowed \$250 as found by the master for incidental damages, and that the costs be equally divided between the litigants. Both parties have excepted.

By the Constitution it is provided that no man's property shall be taken, or applied to public use, without just compensation being made therefor: Const., Art., 1, sec. 21. And the statute which points out the mode of assessing damages for property so taken, says: "In estimating the damages, the jury shall give the value of the land without deduction, but incidental benefits, which may result to the owner by reason of the proposed improvement, may be taken into consideration in estimating the incidental damages." The statute, in effect, embodies the substance of the decision of this court in *Woodfolk v. Nashville & Chattanooga Railroad Company*, 2 Swan, 422. It was there held that where the Legislature, in the exercise of the power conferred by the Constitution, authorized the appropriation of private property to public use, it cannot deprive the owner of the "just compensation" for his property provided by the Constitution. That compensation consists of the value of the property, assessed by a competent tribunal, to be paid in money. The measure of compensation would be the fair cash value of the land, if the owner were willing to sell, and the company desired to buy that particular quantity, at that place and in that form. The Legislature might, however, make any regulations it thought right and proper for an account or estimate of incidental loss or damage, and authorize the incidental benefits and ad-

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vantages to be set off against the damage. The statute has been construed to be in harmony with the decision: *Paducah & Memphis Railroad Company v. Stovall*, 12 Heis., 1; *Mississippi Railway Company v. McDonald*, 12 Heis., 54.

The proof shows that the defendant owns a narrow strip of land on the banks of the Holston river, about 1200 feet in length and perhaps 90 feet in width, the value of which consists almost entirely in its ferry and wharf privileges. Two-thirds of the strip in length is used for a wharf landing, and there is a ferry landing about 125 yards from that part of the land occupied by the bridge pier. The pier takes about 26 feet frontage near the middle of the strip, and at a point where the bank of the river was too steep to be used. The actual value of the land taken does not exceed the amount found by the master, and this sum was properly allowed. There is proof tending to show that the land immediately below the pier is incidentally depreciated for wharfage purposes by reason of the fact that rafts and flat-boats are compelled to go so far out in the stream because of the pier that they cannot readily be brought to land just below it. The testimony shows that the incidental damage thus occasioned is assessed at \$250, and, as there are no incidental benefits to the land arising from the erection of the bridge not common to all other lands in the vicinity, this sum ought also to be allowed the defendant. The chancellor thought that the order of this court limited the reference to the value of the land, but the opinion of the court shows that the de-

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fendant was to have the option to ascertain his damages for the appropriation of the land either in this suit, or at law, and the words "value of the land" as used in the order, was not intended to limit the damages. They were used in the sense of compensation for the land under the statute.

The defendant insists, however, that he is also entitled to damages for injury to his ferry privileges by the erection of the bridge. The ferry landing was about 125 yards from the pier, and the defendant himself testifies, as do all the witnesses who speak on the subject, that "the ferry was not injured" by the pier of the bridge. That is to say, the ferry landing and the ferry franchise remained precisely as before, not in the least affected by the fact that 26 feet of the defendant's strip of land, 125 yards from the ferry landing, were appropriated to the public use, and the pier of a bridge erected thereon. The defendant's ferry franchise, and the exercise of it by the running of boats across the river, and landing them at the usual landing places, remained unimpaired. The profits of the ferry franchise were, however, destroyed, not by the condemnation of the land or the existence of a bridge pier erected thereon, but by the opening of the bridge for travel across the river. The land and the use of it for ferry purposes were not affected, but the value of the ferry franchise was depreciated by the new mode of travel created for the citizens by the proper public authority. And the question is narrowed down to this, is the loss of the profits of a franchise an incidental damage within the meaning of the statute, when

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the exercise of that franchise, as well as the franchise itself, is not impaired by the condemnation of the property to public use, or the existence of the pier?

If a third person owned a ferry franchise exercised upon land either above or below the land condemned, it is clear that he could not claim damages by the condemnation, or the new mode of transit. If the defendant exercised his franchise on another lot than the land condemned, it is equally conceded he would be without remedy. The argument is that the mere fact of the exercise of the franchise by using a part of the lot of land condemned as a landing, the use being in no wise affected by the condemnation, makes a difference and gives the right to damages. But it was expressly held in *Woodfolk v. Railroad Company*, *ut supra*, that the incidental benefit or injury to the party, whose land was taken by the projected improvement, common to all his neighbors, would not be an element of incidental loss or advantage. For it would be unjust to compensate him for the one, or to charge him with the other, when no account is taken of such incidental benefits and injuries with other citizens who receive or feel them equally with himself, but whose lands do not chance to be taken. And, therefore, says Judge Cooley, "In making the estimate of damages, there must be excluded from consideration those benefits which the owner receives only in common with the community at large in consequence of his ownership of other property, and also those incidental injuries to other property such as would not give to other persons a right to compensation, while allow-

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ing those which directly affect the value of the remainder of the land not taken": Const. Lim., 710. A franchise, although exercised upon the land, is "other property" within the rule, if the exercise of the business be not affected by the condemnation. For, says the same author, "No one has a vested right to be protected against consequential injuries arising from a proper exercise of public powers. The construction of a new way, or the discontinuance of an old one may very seriously affect the value of adjacent property, but in neither case can the parties, whose interests may be injuriously affected enjoin the act, or claim compensation from the public": Const. Lim., 481. The injury in the case before us was not by the erection on the condemned land, but by the opening of a new way by the county court, the proper public authority. It is *damnum absque injuria*, and must be borne accordingly.

A decree will be entered accordingly for the two sums reported by the Referees, with interest from the date of the master's report, and all the costs of the cause, in favor of the defendant against the county.

Smith v. Taylor.

R. D. SMITH, Ex'r, *et al.* v. A. D. TAYLOR *et al.*

1. **EQUITY OF REDEMPTION.** *Levy of execution.* The equity of redemption of a judgment debtor in land sold by execution is not leviable by another execution against the person to whom he has conveyed his interest in the land, nor will the redemption or purchase of the land by the grantee after the second levy and sale relate back so as to give the purchaser at the second execution sale a good title.
2. **CHANCERY JURISDICTION.** *To set aside the satisfaction of judgment.* Equity had original jurisdiction to set aside the satisfaction of judgments where no title was acquired by the judgment-creditor to land bought at an execution sale under the judgment, which is not effected by the creation of a statutory remedy, and having jurisdiction for this purpose, the court will sell the land for the satisfaction of the revived debt.
3. **CHANCERY PLEADINGS AND PRACTICE.** *Sale of land in bar of redemption.* A complainant entitled to sale of his debtor's land in satisfaction of a debt, who asks in his bill for a sale of the land in bar of redemption, is entitled to have the land sold, in pursuance of the provisions of the statute, on time, free from the equity of redemption.

FROM HAMILTON.

Appeal from the Chancery Court at Chattanooga.
W. M. BRADFORD, Ch.

N. H. BURT for complainants.

DODSON & MOON for defendants.

COOPER, J., delivered the opinion of the court.

The principal object of this bill is to recover a lot of land in the city of Chattanooga, the title of both parties being derived from the defendant, A. D. Taylor.

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On January 24, 1877, Nassauer & Lowenthal recovered a judgment before a justice of the peace against A. D. Taylor for \$45.10 and costs, which was stayed by Sallie R. Taylor, the debtor's daughter. On January 31, 1878, an execution issued upon this judgment was levied upon the lot in controversy as the property of A. D. Taylor. The papers in the cause were then returned into the circuit court, the land condemned, and an order of sale issued, under which on July 8, 1878, the land was sold to Nassauer & Lowenthal at the price of \$65. On September 2, 1880, Nassauer & Lowenthal, for value received, assign in writing on the execution docket of the court to Sallie R. Whitesides, "all the right, title, claim and interest" in the above described property, vested in them by virtue of the sale. On September 8, 1880, the sheriff acknowledged the execution of a deed of the land to Nassauer & Lowenthal, the deed being dated the — day of August, 1880. After the sheriff's conveyance to them, Nassauer & Lowenthal conveyed the lot by deed to Sallie R. Whitesides, formerly Taylor, she having intermarried with the defendant, Vernon S. Whitesides. Previously, on August 27, 1878, A. D. Taylor, for value received, conveyed the lot in fee to his daughter, Sallie R. Whitesides, to her sole and separate use, with power to dispose of said lot as a *feme sole*. He warranted the title to the lot against all claims whatsoever except the claim of Nassauer & Lowenthal, and another attachment claim not necessary to be noticed.

On August 14, 1877, the complainants, as executors of F. G. Smith, deceased, recovered a judgment be'ore

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a justice of the peace against J. P. Hodges and A. D. Taylor, which was also stayed by Sallie R. Taylor now Whitesides, the judgment having been revived against the husband. An execution issued upon this judgment was levied January 15, 1879, on the lot in controversy, as the property of Sallie R. Whitesides. The land was regularly condemned and sold under an order of sale from the circuit court on June 9, 1879, and bought by the complainants at the price of \$305.43. And in November, 1881, the sheriff made them a deed accordingly.

The title of the purchaser of land sold by virtue of the levy of a justice's execution and an order of sale thereon, relates to the date of the levy: *Parker v. Swan*, 1 Hum., 80. And the levy of an execution only reaches the legal title of the judgment debtors in the land, not an equitable interest: *Birdwell v. Cain*, 1 Cold., 302. On January 15, 1879, when the execution of the complainants was levied on the lot as the property of Sallie R. Whitesides, the lot had been sold under the execution of Nassauer & Lowenthal as the property of A. D. Taylor, to whom it did in fact belong at the date of the levy of their execution, as well as at the date of the sale thereunder to them. Upon the sale of a debtor's land under execution, the whole equitable estate of the debtor is vested in the purchaser, with the right to call for the legal title, and the only right left in the debtor is to repurchase by redemption: *Mabry v. Churchwell*, 6 Heis., 417. If he fail to redeem within the time allowed by law, all his right is at an

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end, and the title of the purchaser, as between him and the debtor, becomes absolute: *Reynolds v. Baker*, 6 Cold., 227. The sale alone gave the purchaser a right to the after-accruing rents, which has not been changed by statute if the land be not redeemed: *Kannon v. Pillow*, 7 Hum., 281; *Wright v. Williams*, 7 Lea., 700. The deed of the sheriff to Nassauer & Lowenthal would relate to the date of their levy: *Wood v. Turner*, 7 Hum., 517. Obviously, therefore, if there be nothing else in the case, at the date of the complainant's levy upon the lot as the property of Sallie R. Whitesides, the equitable estate in the lot was in Nassauer & Lowenthal with the right to demand from the sheriff a conveyance of the legal title, and Sallie R. Whitesides, under the conveyance from her father, had only an equity of redemption, which could not be reached by execution: *Hurt v. Reeves*, 5 Hayw., 50. And even if the naked legal title remained in A. D. Taylor, and passed by his conveyance to the daughter, the interest of the latter was not such as could be levied on by execution: *Thomas v. Walker*, 6 Hum., 93; *Henderson v. Hill*, 9 Lea, 25.

The argument of the learned counsel of the complainants is that Sallie R. Whitesides, at the date of the levy of his clients, had the legal title with the right of redemption, and that such an interest was leviable. But the law, as we have seen, is clearly otherwise. If A. D. Taylor had made no conveyance to his daughter, it would scarcely be contended that his interest could again be levied on by execution.

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And, of course, he could not convey to his daughter any other title or interest than he himself had. A deed, under our system of conveyancing, passes only such interest in the land as the grantor had.

It is further argued that Sallie R. Whitesides, under the deed from her father, assumed to discharge or extinguish the claim of Nassauer & Lowenthal, and that having done so the legal title was cleared of the encumbrance. But the claim of Nassauer & Lowenthal formed no part of the recited consideration of the deed from father to daughter. The father simply declined to warrant against it. And if we treat the contract between the daughter and Nassauer & Lowenthal, evidenced by the transfer of September 2, 1880, and subsequent conveyance by them to her of the land, as a virtual redemption, the deed would not relate back to the date of the levy of the complainant's execution so as to vest her with a leviable title as of that date. Nor does the after required title inure to the benefit of the purchaser at the execution sale, for there is no warranty in such a case to create an estoppel: *Henderson v. Overton*, 2 Yer., 397; *Pratt v. Phillips*, 1 Sneed, 543.

It is also said that a sheriff's deed was necessary to carry the legal title to Nassauer & Lowenthal, and that the title was not perfected until registration. The deed was indispensable to pass the legal title, but the registration laws have no application to judicial sales, and the deed need not be registered: *Droomgoole v. Spence*, 1 Memph. L. J., 159; *Floyd v. Goodwin*, 8 Yer., 483; *Attorney-General v. Day*, 1 Ves., 218. It

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must be borne in mind moreover that it is only against the creditors of the grantor, not of the grantee, that registration is important. *Ocoee Bank v. Nelson*, 1 Cold., 193. And the execution of the sheriff's deed is of no importance, for the complainant's judgment-debtor had, as we have seen, no leviable interest in the lot at the date of the complainant's levy. Nor is the deed important to show an outstanding title, for the complainants must recover on the strength of their own title. They show neither a legal title nor such an equity as entitles them to divest the defendant of her legal title. They acquired nothing by their purchase, and cannot maintain the bill on any right then acquired.

The bill asks, in the event the principal relief is refused, that the satisfaction of the complainants' judgment be set aside, and that the lot be subjected to the satisfaction of the debt by sale, free from the equity of redemption. The defendants put in a general demurrer to the whole bill assigning as causes that the remedy was by action of ejectment at law, and that the action should have been brought by the heirs, not the executors of F. G. Smith. This demurrer was properly overruled, equity now having jurisdiction of an action of ejectment, and the title to both the land and the judgment, if any, being in the complainants. In their answer the defendants deny that the complainants are entitled to the alternative relief sought, because the statute prescribed the mode in which the satisfaction of the judgment may be set aside, which must be pursued. But it is well settled in this State

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that equity had original jurisdiction to set aside the satisfaction of judgments in cases of this character, where no title was required by the sale, and that the jurisdiction is not taken away by the creation of a statutory remedy: *Henry v. Keyes*, 5 Sneed, 488; *Neal v. Read*, 7 Baxt., 333, 338; *Hayes v. Cartwright*, 6 Lea, 141. And having jurisdiction for this purpose will grant complete relief by selling the land in satisfaction of the revived judgment: *Smith v. Hinson*, 4 Heis. 250; *Hoyal v. Bryson*, 6 Heisk., 139. The bill asks for a sale in bar of redemption, and the complainant is entitled to a sale accordingly upon a credit of not less than six months nor more than two years: *Gibbs v. Patten*, 2 Lea, 180.

The chancellor's decree will be reversed, and a decree rendered here in accordance with this opinion. The land will be sold on a credit of twelve months, free from any equity of redemption, in satisfaction of the complainant's judgment, interest and costs, and cost of this cause.

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2. *County Surveyor. Action on official bond.* Chancery court has jurisdiction of an action against a county surveyor, on his official bond, for failure properly to survey land sold by the acre; and where such bill is brought by the vendor, against whom the mistake was made, he may recover the fees paid by him for the erroneous survey, any costs incurred in the assertion of his rights against the vendee, and if the excess beyond the number of acres intended to have been sold has been lost, *semble*, he may recover, also, the value of such excess. *State v. Keller*, 399.
3. *Ejectment.* By the act of 1877, ch. 97, the chancery court has the same jurisdiction as the circuit court in all cases of ejectment for land. The fact that the land is of less value than fifty dollars does not deprive the chancery court of jurisdiction. *Frazier v. Browning*, 253.
4. *Unliquidated damages.* An officer to satisfy an execution levied upon some wheat, a *supersedeas* from the circuit court issued. The clerk took insufficient bond; wheat was released by the officer, and disposed of by the debtor, who was insolvent. Upon bill in chancery court to hold the clerk and sureties upon his official bond liable for the value of the wheat, upon demurrer for want of jurisdiction in the chancery court. *Held*: That the action was not for "unliquidated damages," and that the chancery court had jurisdiction. *Glenn v. Moore*, 256.
5. *Guardian and Ward. Non-residents.* The chancery court of the district in which a guardian has been appointed for infants, has jurisdiction upon the application of the guardian, to break into the principal of the estate of the infants for their benefit, where the estate whether consisting of realty or personalty, is placed under the control of the court, although the guardian and wards are non-residents of the State, and the latter made defendants by publication. *Hart v. Czapski*, 151.
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person, and to have the benefit of any recovery in a suit commenced by him in the chancery court of another county for the collection of the judgment, the object may be attained by impounding the recovery, without interfering with the prosecution of the suit, but if the injunction sued out be broader than it ought to be, it would not effect the jurisdiction of the court granting it, being subject to be modified on motion. *Id.*

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1. *Upon remand from Supreme Court.* Upon the hearing of a case in the Supreme Court upon exceptions to a report, and an order is made remanding cause to complete account, no additional proof can be taken upon the items of the account passed upon by the court without a reference of the question is ordered or permission to further inquire as to the disputed point. *Brown v. Brown*, 698.
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4. *Same. Same. Chancery pleading.* When there is such a surplus in land sold by judicial sale, the remedy is by an original bill, and not by a bill of review, after confirmation and complete vestiture of title, and after confirmation but before vestiture of title, by a supplemental bill. *Id.*
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- ial provisions of the Code authorizing the *supersedeas* of certain interlocutory orders. But such an order is brought up by a general appeal on final hearing, and will remain in force if executed, and may be executed by this court, upon application, either directly, or by *procedendo* to the court below. *Enochs v. Wilson*, 7.
8. *Dismissal of suit out of term*. By statute a suit in chancery may be dismissed in writing out of term as well as in term, and the dismissal, when established by proof, with or without contest, will relate back to, and be operative from the day of its execution. *Sharpe v. Allen*, 518.
 9. *Attorney's lien*. Neither the attorney of the party who dismisses a suit, nor third persons although parties to the suit, are entitled to resist the dismissal, but if the attorney or third person has previously acquired, either by decree or lien, an interest in the subject-matter of litigation which the law recognizes, that interest will not be affected by the dismissal, and may be asserted by proper proceedings. *Id.*
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19. *Sale of land in bar of redemption.* A complainant entitled to sale of his debtor's land in satisfaction of a debt, who asks in his bill for a sale of the land in bar of redemption, is entitled to have the land sold, in pursuance of the provisions of the statute, on time, free from the equity of redemption. *Smith v. Taylor*, 738.
20. *Stale demands.* There is no intendment in favor of stale demands, and a clear case must be made by the claimant in order to secure the aid of a court of equity. *Lane v. Farmer*, 568.
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23. *Same. Same.* The report of C. & M., with some exceptions thereto overruled, and some sustained, with directions and instructions for modification of the report, does not form the basis of such final decree settling the rights of the parties, from which an appeal can be taken. *Id.*
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COMPENSATION.

SEE GARNISHMENT.

CONDEMNATION OF LAND.

See RAILROADS; DAMAGES.

CONSTITUTIONAL LAW.

See TAX ASSESSMENT.

1. *Removal of county seats.* Under the Constitution of 1870, art. 10, sec. 4, which forbids the seat of justice of any county to be removed without the concurrence of two-thirds of the qualified voters of the county, the removal from the old site to a new place cannot be made except by the required vote, and therefore the act of 1881, ch. 98, which authorizes the removal by a majority of the votes, is unconstitutional. *Combs v. Stumple*, 26.
2. *Equal taxes. Value at time tax imposed.* Constitution, article 2, section 28, requires all taxes to be equal and uniform throughout the State. This requires that all property be assessed at its value at the time the tax is imposed. The act of 1883, which gives the chancery court power to reduce taxes assessed in Memphis before the charter of that city was repealed, "when it shall appear that such assessments are excessive in view of the present value of said property," is unconstitutional. *State v. Butler*, 410.
3. *Indebtedness of Memphis.* The acts of 1883, ch. 162 and 190, are inoperative and invalid so far as they purport to change or direct the rights of creditors acquired under the act of 1879, ch. 92. A compliance with the provisions of that act conferred rights which cannot be impaired by subsequent legislation. *State v. Butler*, 493.

CONSTITUTIONAL LAW—*Continued.*

4. *Retrospective law. Remedy.* Section 3485 of the Arkansas Code, providing that a judgment assessing damages against a principal in an injunction bond, shall be conclusive on the surety, embraces bonds executed before its enactment, and as to which, since it affects the remedy merely, it is constitutional. *Pickett and Rayner v. Boyd*, 498.
5. *Retrospective laws. Damages.* The act of the Legislature of March 26, 1883, which provides that section 2291 *et seq.* of the Code be so amended that damages resulting to parties for whose use and benefit the right of action survives, from the death consequent upon the injuries received, shall be recoverable in such action, does not apply to suits where the cause of action arose prior to the passage of the act. The act constitutes a new or additional cause of action. The rights of the parties were fixed under the law as it existed at the time of the injury, and the law which undertook to change those rights would be retrospective and void. *Railroad v. Pounds* 127.

CONSTABLE.

See JUSTICES OF THE PEACE.

CONTEMPT.

See CRIMINAL LAW.

1. *Interference with selection of jury.* An attempt to induce an officer of the court to summon as jurors in a particular case then to be tried certain persons specified by him in preference to others, is an unlawful interference with the proceedings of the court, and is a contempt for which he is punishable by the court; and this is so, although not within the court-house or in the immediate presence of the court. *Sinnott v. State*, 281.
2. *Fines. Work-house.* Fines imposed for contempt may be required to be worked out in the county work-house, and defendant will not be allowed to discharge the fine by taking the insolvent debtor's oath. *Id.*

CONTRACT.

See EMPLOYER AND EMPLOYEE, RAILROAD.

CONTRIBUTORY NEGLIGENCE.

See ATTORNEY.

CONVERSION.

See PLEADINGS AND PRACTICE.

CONVEYANCE.

1. *Married women. Certificate.* The certificate of acknowledgment of a married woman to a conveyance which omits "and for the purposes therein expressed," is defective and vitiates the validity of the conveyance. *Currie v. Kerr*, 138.
2. *Sale of Land.* An instrument in the usual form of a deed, by which one person purports, for a recited consideration, to have "bargained and sold" to another a specified tract of land, "to have and to hold" to the latter as "an inheritance in fee simple forever," will convey the land to the grantee in fee. *Hanks v. Folsom*, 555.
3. *Assurance of title. Married woman.* A deed of conveyance of land in fee executed by a married woman alone, without any privy examination, is an assurance of title purporting to convey an estate in fee which will perfect the title of an adverse holder of land under the Code, sec. 2763. *Id.*
4. *Husband and wife. Limitations.* The disseizin occasioned by the possession of the grantee of such a deed would be a disseizin of the joint estate of husband and wife, and their joint right of action would be barred in seven years, and the title of the husband not only barred but extinguished, and the heirs of the wife, if she died before the husband, would have only three years after her death and the extinguishment of the husband's right within which to bring suit for the recovery of the land. *Id.*
5. *Same. Estoppel. Quere,* whether the married woman would be estopped to recover the land by representing herself as unmarried, or her children by accepting the consideration paid, and not offer to return it. *Id.*

CORPORATIONS, MUNICIPAL.

1. *Taxing districts. Power to impound stock.* Under the third section of the act of the Legislature creating Memphis a taxing district, power is given said [district] by ordinance to provide for impounding stock running upon the streets. *Moore v. State*, 35.
2. *Change of limits. Chancery courts.* The courts of chancery in this State are not authorized by the act of 1871, ch. 54, to change the territorial limits of a municipal corporation. *Willett v. Corporation of Bellville*, 1.
3. *Powers.* The city of Memphis, under the act of 1866, authorizing special assessments for construction of pavements, laid a special tax, which, after it was partly collected, was declared void; under the act of 1873, ch. 67, the city passed an ordinance directing the mayor to take up all receipts for payments of the void tax and issue certificates of indebtedness under the seal of the city instead thereof. The

CORPORATIONS, MUNICIPAL—*Continued.*

mayor took up a receipt wrongfully obtained by A from B, to whom it was payable, bearing no evidence of assignment, and issued a certificate of indebtedness to A, who sold it to a third party; the city, under a petition by B in a proceeding, instituted under the act of 1879, ch. 92, was ordered to issue another certificate of indebtedness to B. *State v Butler*, 418.

4. *Void tax. Promise to repay.* A municipal corporation is under no legal obligation to repay amounts received under a void ordinance and statute, but the moral consideration will support a promise of repayment. *Id.*
5. *Power to issue bonds.* Municipal corporations can only subscribe for stock in railroads and issue bonds under an act of the Legislature conferring the power or right to do so. If the act of the Legislature authorize bonds to be issued of a certain denomination and bearing a certain rate of interest, the municipal corporation has no authority to issue bonds for a greater denomination and an increased rate of interest. *Tax-payers of Milan, etc., v. Railroad*, 329.
6. *Same.* An act of the Legislature which authorizes a municipal corporation to subscribe for stock in a railroad, and "to lay and collect taxes to pay interest on the bonds which may be issued," does not confer authority to issue bonds. *Id.*
7. *Bonds.* Bonds, being issued without authority of law, are void; are not negotiable, and their possession gives no right to the holders to be repaid by the corporation the amount paid for them. *Id.*

COSTS.

See BOND, APPEAL.

COUNTY WARRANTS.

See SUPREME COURT PRACTICE.

1. *Suits against county.* A county may be sued upon a demand although the plaintiff may not have followed and exhausted all the modes prescribed by sec. 427 *et sequente* of the Code for obtaining money from the county treasury. *Gibson County v. Rains*, 20.
2. *Interest.* These warrants are not negotiable and do not bear interest, but the jury may allow interest by way of damages, if they see proper. *Id.*

CREDITORS, JOINT AND SEPARATE.

See PARTNERSHIP.

CRIMINAL LAW.

1. *Sale of liquor. Witness. Contempt.* The statute making it a criminal offense to retail spirituous liquors on Sunday is intended to punish the seller, not the buyer, and the latter may therefore be compelled to testify as a witness on the trial of an indictment against the seller, and may be punished for contempt in refusing to testify. *Page v. State*, 202.
2. *Cruelty to animals.* A person has the right to protect his premises against the depredations of mischievous dogs, and for that purpose to use such means as are reasonably necessary, and if the depredating animal is thereby caught in a steel-trap and mutilated, it would not be *needless* torture or mutilation under the statute. *Hodge v. State*, 528.
3. *Practice. Counsel in argument may read law to jury.* It is error in the court to refuse to permit counsel in the argument of a case before the jury, to read the law to the jury. *Hannah v. State*, 201.
4. *Forfeiture against witnesses.* Forfeiture may be taken against a witness regularly subpoenaed although it does not affirmatively appear that the default of the witness was willful. *State v. Thomas*, 113.
5. *Sale of liquor on Sunday. Witnesses.* On the trial of an indictment against the owner of a saloon for retailing spirituous liquors on Sunday, the bar keeper of the owner is not compellable to testify if his answer would expose him to a criminal charge for the same offense. *Muller v. State*, 18.
6. *Incompetency of juror.* A juror is not incompetent because he said "from what he found out that he thought if prisoner didn't hang they would penitentiary him for life," it not appearing that the statement made by him was founded upon what purported to be evidence that had been or would be introduced on the trial, or that any witness, or anyone who had heard a witness, had conversed with him. *Johnson v. State*, 47.
7. *Proof of name of deceased.* The failure of the witnesses, on a trial for the murder of a particular individual, to give the full name of that person as set out in the bill of indictment, is not material after verdict, if the name or description as given by the witness corresponds as far as it goes with the name mentioned in the indictment, it sufficiently appearing that there was no contest over the name or identity of the person. *Rutherford v. State*, 31.
8. *Plea in abatement.* The court may properly strike out, on motion, a plea in abatement to an indictment after the defendant has gone to trial on the merits alone, whether the plea was filed before or after the commencement of the trial. *Dyer v. State*, 509.
9. *Same.* A plea in abatement to an indictment that the court was opened by the clerk, the judge being absent, and that the grand jury

CRIMINAL LAW—*Continued.*

were *attempted* to be elected, empaneled and sworn by the Attorney-General, is bad. *Id.*

10. *Same. Quere*, whether such a plea, if sufficient in form, can be allowed where the record of the court states that the grand jury were properly elected, empaneled and sworn by the judge? *Id.*
11. *Copy of indictment to prisoner.* If the defendant in a capital case, after the court at his instance had made an order directing a copy of the indictment to be furnished him, go to trial on the third day thereafter without objection, one of the intervening days being Sunday, he will be presumed to have waived his statutory right to have the indictment two entire days before trial. *Taylor v. State*, 708.
12. *Continuance.* It is not error to refuse a continuance in such a case upon the affidavit of the defendant that "he is informed by his counsel" that a person named, living thirty-five miles from the place of trial, and another person named then in Oregon, knows facts material to his defense, by whom he expects to prove that he is not responsible for the crime charged in the indictment, the record showing that there was sufficient time to have had the testimony of the first witness at the trial, and that the statement as to the other witness was false and fabricated for delay. *Id.*
13. *New trial.* It is not error in the trial judge in such case to refuse a new trial, upon the affidavit of the defendant's attorney alone that "he is informed" that an absent witness will depose to a certain conversation between defendant and an associate in guilt on the day of the murder, the affiant not expressing any belief in the information, and the affidavit not being supported by the affidavit of the defendant himself to the fact of such conversation, and of the person who received the information direct from the absent witness. *Id.*
14. *Res gestæ.* A conversation between the defendant and an accomplice or associate in guilt shortly before the commission of a murder by them, is not competent evidence on behalf of the defendant. It is no part of the *res gestæ*. *Id.*
15. *Discharge of juror.* A person selected as a juror in a capital case may be discharged by the trial judge before the jury is sworn upon satisfactory proof by the State that he had formed and expressed an opinion of the guilt of the prisoner, the latter not objecting to the discharge. And there is no error in permitting the other jurors, who had associated with the discharged juror, to remain on the jury, the defendant not objecting to their retention, and the record not showing that he had exhausted his challenges before the jury was completed. *Id.*
16. *New trial.* It is not error to refuse to delay a criminal trial or to grant a new trial, upon the suggestion that a witness, who had

CRIMINAL LAW—*Continued.*

- been examined on the part of the State, would "give important evidence on behalf of the defense," the application not showing that the witness had been subpoenaed, where he was, when he could be procured, nor what he could prove, especially if the defendant consented that the witness might leave. *Id.*
17. *Res gestae.* A statement made by the defendant's associate in his presence, and the presence of others, after the commission of a murder that he regretted it, and was forced by the murdered men to kill them, is no part of *res gestae*, and inadmissible as evidence for the prisoner. *Id.*
18. *Indictment.* An indictment for murder in the common-law form is sufficient to sustain a conviction of murder in the first degree. *Id.*
19. *County Judge.* An indictment will not lie against county judge for failure to make semi-annual report to county court under third section of an act passed March 7, 1879, ch. 76. *State v. Cordell*, 546.
20. *Indictment.* A count in an indictment which charges that the defendant sold whisky without having first taken an oath not to mix or adulterate, and without giving bond, etc., does not charge two offenses in same count. *Webb v. State*, 662.
21. *Sale of whisky.* Manufacturers of whisky or brandy out of the products of farms or orchards of the State cannot sell by retail within four miles of an incorporated institution of learning. *State v. Tarrar*, 658.
22. *Retail dealers.* Sales to persons or customers for the purpose of consumption constitute a retail dealer. *Id.*
23. *Attempt to commit statutory misdemeanor.* A mere attempt to commit a statutory misdemeanor is not indictable. *Whitesides v. State*, 474.
24. *Malicious mischief.* If a mere trespasser erect a building on the land of another, having neither right of property or occupancy, the building becomes at once a part of the freehold, and the owner of the land may remove the building without being guilty of malicious mischief under the Code, sec. 4652, sub-sec. 1. *Malone v. State*, 701.
25. *Arrest by private citizen.* A private citizen has the right to arrest when a felony has been committed and he has reasonable cause to believe the person arrested committed it. Reasonable grounds will justify the arrest, whether the facts, when developed, would be sufficient or not. The finding of stolen goods in possession of the party arrested was proof sufficient that a felony had been committed, especially when connected with the confession of larceny by the prisoner, and finding some of the property where defendant said he had secreted it. *Wilson v. State*, 310.

CRIMINAL LAW—*Continued.*

26. *Improper conduct of jury.* If the prisoner may have been prejudiced by the improper conduct of the jury, the law will presume he was. *Nile v. State* 694.
27. *Practice.* In criminal cases courts should distinctly charge juries that they must look alone to the testimony adduced in evidence before them on the trial, and should not permit one of their number to communicate to them any facts not deposed to in court. *Id.*
28. *Same.* Although it is a dangerous practice, affidavits of jurors as to improper conduct of the jury will be looked to, but with caution. *Id.*
29. *Obtaining goods by false pretense.* Where S had W's note for \$150 and agreed with him if he would purchase land of N, he would credit his note for that amount, and W purchased the land at \$130, but represented to S that N had raised the price to \$150, and S agreed to take it at that price if W could not get it for less. N conveyed the land as S directed and S gave up the note to W. *Held*, though a gross fraud, not a false pretense in the legal sense. *Wallace v. State*, 542.
30. *Indictment. Variance.* Where the indictment alleged the note was executed by W to S, and the evidence showed it was executed to S's daughter, and by her assigned to S. *Held*, this was a fatal variance. *Id.*
31. *Same. Evidence.* In such case it is not necessary to object to the evidence, as it was a case where the averments in the indictment were not sustained. *Id.*
32. *Perjury. False swearing in U. S. Courts.* No indictment for perjury can be predicated in the State courts upon the false swearing of a party before a United States judicial tribunal in a case pending in such tribunal. *Id.*

DAMAGES.

See PLEADINGS AND PRACTICE; CONSTITUTIONAL LAW; EMPLOYER AND EMPLOYEE; RAILROADS; ATTORNEYS; CHANCERY PLEADINGS AND PRACTICE.

1. *Appeal bond. Payment of part of judgment.* The damages stipulated for in an appeal bond are the damages in consequence of the appeal, being the interest at the rate of six per cent. per annum upon the amount of the judgment of the lower court from the date of its rendition to the recovery in the appellate court, and any payment made on the debt from the last judgment will be applied by law to the satisfaction of such damages in the first instance. *Mason v. Smith & Harris*, 67.

DAMAGES—*Continued.*

2. *Ferry and wharf landing. Condemned for county bridge.* Where a small part of a strip of land along a river bank used as a ferry and wharf landing is condemned for the purpose of erecting thereon the pier of a county bridge across the river, the owner of the land is entitled to be paid the value of the land taken, and the damages for the injury to the adjoining land as a wharf landing, but not to the loss by the depreciation of the profits of the ferry franchise by the opening of the bridge; the franchise itself and its exercise not being impaired by the existence of the pier. *Moses v. Sanford*, 731.
3. *Railroads. Evidence.* In an action against a railroad company, as a common carrier, for damages to horses in transit, the measure of damages would be the value of the horses killed and the depreciation in the value of those injured, at the place of delivery, but direct testimony by the opinion of witnesses of that value or depreciation is not indispensable; it is sufficient if there is proof of these facts in the market of a neighboring State connected with the place by railroad, and a full description of the animals and their qualities, and of the character of the injuries. *Railroad v. Mason*, 116.
4. *Same. Same. Charge of court.* Under such circumstances, it is not error to charge the jury that they may fix the amount of the plaintiff's damages, if they find for him, from the age and qualities of the stock, and the nature of the injuries as shown by the proof, although no witness has given an opinion as to the value of the stock or the amount of damages at the place of delivery. *Id.*

DEALERS IN FUTURES.

See PRIVILEGES.

DEED IN TRUST.

1. *Deed of trust.* A deed of trust relates from its registration to its execution, and is valid against all existing and subsequent creditors who have acquired no lien prior to its registration. *Cowan, McClung & Co. v. Gill*, 674.
2. *Same. Fraud.* Mere silence of trustee and beneficiaries of the execution of the trust deed and failure to register, will not vitiate the deed for fraud. *Id.*
3. *Same. General assignment.* A trust deed executed fourteen months before a general assignment, but not registered until within three months of said assignment, is not void under the act of 1881, ch. 121. The deed is *made* when executed, not when registered. *Id.*
4. *Beneficiary may attack. When.* If a beneficiary under a general assignment which recognizes a prior trust deed, file a bill to set aside the

DEED IN TRUST—*Continued.*

prior trust as fraudulent and is unsuccessful, he does not thereby forfeit his right to share in the general assignment. *Id.*

DEFECTIVE TITLE.

See FRAUD.

DEPOSITIONS.

1. *Questions omitted.* Code, section 3859, declaring that the commissioner should require the questions to be reduced to writing, etc., is directory. It is advisable to insert the questions, as they often aid in the interpretation of the answers; but it is not essential to its admissibility that a deposition should be thus taken. *Read v. Patterson*, 430.
2. *Same. On whose behalf.* Where the deposition fails to show on whose behalf the deponent is a witness, it suffices if this fact appears from the notice. *Id.*
3. *Same. Signature of witness.* Regularly a deponent should sign at the end of the deposition, but a deposition is not inadmissible because the deponent signed at the end of the commissioner's certificate. *Id.*
4. *Same. Official character of commissioner.* It is sufficient if the official character of the commissioner appears from his signature at the end, though not stated in the body, of the certificate. *Id.*
5. *Same. Postponement.* Where the notice is to take the deposition on a certain day, the officer cannot postpone to another day; but if the notice be to take on a day certain, and the deposition is then commenced, and it becomes impracticable to finish it that day, it may be finished the next. *Id.*

DESCENT.

Legitimation. A legitimated child inherits as if born in lawful wedlock. *Williams v. Williams*, 652.

DOWER.

Entitled to, When. A widow is entitled to dower in land contracted to be sold by the husband in his lifetime, if, after his death, the contract be rescinded on account of a defect in the vendor's title to the land. *Lunsford v. Jarrett*, 192.

EASEMENT.

1. *Prescription. Essential elements.* A railroad company, by failing to keep open a ditch which ran alongside of an embankment constituting a part of its road-bed, accumulated the surface water in such quantities as to overflow adjoining lands, the owner of which made constant complaint, but delayed suit until more than seven years after the commencement of this wrong. *Held*: (a) Each over-

EASEMENT—*Continued.*

flow was a distinct trespass, which, being committed without any claim of right by the company, and without the consent of the owner of the overflowed land, could not establish an easement by prescription or limitation. (b) Twenty, and not seven, years is the period of prescription for an easement, such as a right of way or servitude of overflow. (c) A benefit accruing is an essential element in an easement, and no period of prescription can create a right to maintain a nuisance, which injures all whom it affects and benefits no one. *Railroad v. Hays*, 382.

2. *Surface water. Relative rights of adjoining land-owners.* All lands are of necessity burthened with the servitude of receiving and discharging all waters which flow down to them from lands on a higher level; the owner of the lower land is liable when he, without grant or prescription, by artificial means, dams up the water and causes it to overflow the higher lands, and the owner of the higher lands, when he collects the water and pours it in a concentrated form or unnatural quantities upon the lower lands. This rule embraces rain and surface water as well as running streams. *Id.*

EJECTMENT.

See PLEADINGS AND PRACTICE; CHANCERY JURISDICTION.

1. *Sheriff's deed.* In action of ejectment by plaintiff under a sheriff's deed to land sold as the property of defendant, it is not incumbent on plaintiff to deraign title. *Christian v. Mynatt*, 615.
2. *Levy. Imperfect description of land.* A levy is sufficient if those living in the immediate neighborhood will recognize the description." *Id.*
3. *Grant. Boundaries.* In fixing the boundaries of granted land, in the absence of marked lines and corners, where the line runs up a creek, a locative call of a branch running into the creek will control the call for distance, and the jury may find that the line ended at the branch, although the call for distance would carry the corners beyond that point. *Disney v. Coal Creek Mining and Manf. Co.*, 607.
4. *Same. Plat and survey.* Where, in an ejectment suit, the rights of the parties turned upon the length of the line of one of the calls of the defendant's grant, and the defendant in his plea expressly recited and claimed that the line was forty poles by the survey and seventy poles by the grant to the corner designated, and the plat and survey in which the grant was issued were introduced in evidence without objection, it was not error for the trial judge to charge that, in the absence of satisfactory proof of marked lines and corners, and where there are doubts in regard to the boundaries arising from the calls of the grant, the plat and certificate of survey might be referred to in explanation of the grant, and as evidence of the local-

EJECTMENT—*Continued.*

ity of the land granted; and the charge is probably correct in all cases where there are doubts in regard to the boundaries arising from the calls of the grant when applied to the ground, and the natural and artificial monuments. *Id.*

EMPLOYER AND EMPLOYEE.

1. *Damages.* Mrs. Neville sued Morris for keeping from her service certain employees with whom she had contracted for service. Upon trial, it was not error in the trial judge to refuse to charge "that if before Morris employed the laborers, or any of them, they had voluntarily broken their contract with plaintiff, with or without cause, then they would not be under contract with her, or in her employ, and Morris, in hiring them, would not be liable to plaintiff for damages." *Morris v. Neville*, 271.
2. *Contract.* An agreement to give a part of the crop in consideration of the labor of tillage is as much a hiring as an undertaking to pay in money. *McCutchin v. Taylor*, 259.
3. *Damages.* Upon a suit for decoying away hands under such an agreement, in estimating the damages it will be competent to look to everything resulting from the loss of labor such as the reasonable cost of procuring other labor; the damage to crops from delay in planting or failure to work them, and such kindred damages as plaintiff by reasonable diligence could not have prevented. *Id.*

ESCROW.

See BILLS AND NOTES.

ESTOPPEL.

See LANDLORD AND TENANT; CONVEYANCE.

EVIDENCE.

See LIBEL; DAMAGES; BAILMENT; PLEADINGS AND PRACTICE; FRAUD; RAILROADS.

Pedigree. Proved by reputation or hearsay. Time of birth, as a matter of pedigree, may be proved by reputation or hearsay, without producing the family register, if one exist. *Swink v. French*, 78.

EXECUTION.

See REDEMPTION, EQUITY OF; LIEN; NOTICE.

EXECUTORS.

See PLEADINGS AND PRACTICE.

EXEMPTION

See HOMESTEAD; TAXES; GARNISHMENT.

1. *Mechanic's tools. Photographers.* A photographer is not a mechanic within the meaning of the statute which exempts from execution in the hands of each mechanic, etc., one set of mechanic's tools. *Story v. Walker*, 515.
2. *Gift of exempt property. To defeat creditors. Administrator.* A gift of personal property exempt from execution to take effect at the death of the donor, the sole object of which is to defraud creditors, when the exemption has ceased to exist, may be set aside by the administrator of the donor, for the benefit of creditors. *Martin v. Crosby*, 168.

FINES.

See CONTEMPT.

FRAUD.

See EXEMPT PROPERTY; DEED OF TRUST.

1. *Representations.* If representations are made by the seller at the time of purchase, which the buyer relied on and was thereby induced to make the trade, and these representations were false, and known to be so by the seller, this would be fraud, and would defeat a recovery upon a note given for the purchase money. *Kelly v. Turberville*, 339.
2. *Same. Warranty.* If the buyer relies partly upon an examination and test of the article sold, but mainly upon the representations of the seller, and these representations were with intent they should be relied upon, it is a warranty upon which he may recover. *Id.*
3. *Burden of proof.* The burden of proving that a deed from a father to a son is voluntary and fraudulent is upon the attacking creditor. *Williamson v. Williams*, 355.
4. *Defective Title. Presumption of knowledge.* The acceptance of a mere quit claim deed, or one with only a special covenant of warranty, is *prima facie* proof that the conveyee knew the title was defective. *Id.*
5. *Evidence. Declarations of conveyor.* If a party makes a deed and retains possession inconsistently with the deed, his statements in reference to the ownership, or contract or character of possession, are admissible against the conveyee; but it is otherwise when his possession is consistent with the terms of the deed or contract. *Id.*
6. *Innocent purchaser. Resulting trust.* Where property is fraudulently conveyed to evade creditors to an assignee, cognizant of the fraud, who conveys to an innocent third person, who pays a full consideration in ignorance of the fraud, the consideration paid takes the

FRAUD—Continued.

place of the land conveyed, and the mesne fraudulent assignee becomes liable therefor to the creditors of the original grantor. *Williams v. Williams*, 355.

FUNERAL EXPENSES.

See LIFE TENANT.

GAMING.

See PLEADINGS AND PRACTICE.

GARNISHMENT.

1. *Pleadings and Practice.* Where garnishment is served on two parties, and both answer, it is error to consider the answers of both together in making up judgment against one, at least where the amount involved is over \$50, (\$1,000 under act of 1883, ch. 11). *Walton v. Sharp*, 578.
2. *Same.* In garnishment proceedings the plaintiff must show judgment and execution. *Id.*
3. *Question reserved.* Whether, where answer of garnishee shows that the legal title to a note is in him, (he holding it as collateral security), and the equitable title is in another, he could be compelled to surrender it, at least until his debt is satisfied. *Id.*
4. *Deputy sheriff. Fees or salary.* The salary of a deputy sheriff who is paid a compensation for his services instead of fees allowed by law, is not subject to garnishment. His services are necessary in carrying on the machinery of government, and the exemption is on the grounds of public policy. *Oliver, Finnie & Co. v. Athey*, 149.

GIFT.

See EXEMPT PROPERTY.

GUARDIAN.

See HUSBAND AND WIFE; LIMITATIONS.

GUARDIAN AD LITEM.

See CHANCERY PLEADINGS AND PRACTICE.

GUARDIAN AND WARD.

See CHANCERY COURT JURISDICTION.

Resulting trust. Husband and Wife. If the late guardian of a female ward and of other wards, several years after the marriage of such female ward and after he had settled with the other wards, cause execution

GUARDIAN AND WARD—*Continued.*

to issue on a judgment recovered by him as guardian before the marriage, and purchase land sold under it, the presumption would be that he acted under a claim of right and for himself, and if any resulting or constructive trust would arise from the fact that the husband and wife had funds in their hands of the guardian or an interest in the judgment, the trust would be in favor of the husband, and if he elected to follow the fund into the land, it would be a reduction of the fund or chose in action into possession. *Lane v. Farmer*, 568.

HOMESTEAD.

1. *Abandonment. Case stated.* In 1873 A sold, without the concurrence of his wife, who had deserted him, taking their only child with her, and was at the time residing at her father's, a tract of land, at the time under lease to a third party; A assigned the purchase notes and the assignees filed a bill to enforce the lien and obtained an order of sale, whereupon A filed a bill to obtain homestead in the land. *Held*, A is not entitled to homestead. *Quere.* Is the wife? *Riddick v. Turpin*, 478.
2. *Mortgage.* A wife, who joins her husband in conveying the land on which they have a homestead right of the value prescribed by law, cannot afterwards claim a homestead in another part of the same tract of land previously mortgaged by the husband. *Enochs v. Wilson*, 228.
3. *Judgment in favor of State.* An execution on a judgment in favor of the State against a defaulting tax-collector, for taxes due the State collected and not paid over as required by law, can not be levied upon the homestead of the defaulting tax-collector. *Ren v. Driskell*, 642.
4. *Same.* The homestead in such case is exempt from seizure and sale under execution in favor of the State. *Id.*
5. *How same must be conveyed.* While, under the act of 1868, the husband may convey the homestead for the benefit of the family, yet he cannot divest their interest by any less solemn act. *Id.*
6. *Contracts before enactment of exemption. Bonds, official.* The relation between principal and surety, or between sureties themselves, and the rights deduced therefrom, originate in the execution of the instrument of suretyship and is substantially a contract by implication of law from the relation created by the execution of the instrument. Where, therefore, an official bond was executed before the passage of the homestead exemption, and a mortgage given on property to indemnify the sureties, the liability was created by the bond, and the homestead is not exempt, though default was made after the passage of the homestead exemption. *Bryant v. Woods*, 327.

HOMESTEAD—Continued.

7. *Homestead. Improvements. Mechanic's lien.* Real estate in the occupancy of the head of a family is not exempt from sale for the satisfaction of a debt contracted for improvement made thereon, although the creditor may have lost his lien as a mechanic for the debt. *Miller v. Brown & Forsyth*, 155.
8. *Marshaling securities. Homestead. Abandonment.* A conveyed by trust deed, two tracts of land, upon one of which A and wife resided, to secure debts owed B, C and D; A and wife subsequently conveyed by trust deed, releasing homestead, the same land and certain personalty to secure the debt owed B included in the first conveyance. *Held*, on bill brought by C and D; first, B having two funds for his security, while C and D had only one of them, would be compelled first to exhaust the personalty before sharing in the proceeds of the realty; second, though the second conveyance was not *per se* an abandonment of the homestead, the equitable title remaining in the conveyor, nevertheless, since complainants were entitled to have the second conveyance enforced and whatever right the trustee had under it sold, the purchaser at such sale would be entitled to possession as against A and wife; the result would be that the homestead, being a mere exemption and not an estate, would be extinguished and the purchaser under the first deed would get the benefit of it; consequently, the sale of the realty was ordered to be made as follows: (A) the tract upon which A and wife did not reside; (B) the tract upon which A and wife resided, first setting apart homestead; (C), if the amounts thus realized were insufficient to pay all the debts, then the tract upon which A and wife resided, absolutely and in bar of homestead. *Parr, Nolen & Co. v. Fumbanks*, 391.

HUSBAND AND WIFE.

See CONVEYANCE; LIMITATIONS; GUARDIAN AND WARD.

1. *Support of children.* If a man marry a woman with infant children, and he take them into his family, and treat them as part of his family, the law implies an obligation on his part to support them. *Norton v. Ailor*, 563.
2. *Same.* After the death or majority of one of such children, without promise to pay, the step-father can not recover from its guardian for its support and maintenance during its minority.

IMPOUNDING STOCK.

See CORPORATIONS, MUNICIPAL.

INJUNCTION.

See CHANCERY COURT JURISDICTION.
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INTEREST.

See COUNTY WARRANTS; RAILROADS.

INSOLVENT ESTATE.

See ADMINISTRATION.

JUDGMENT.

See PLEADINGS AND PRACTICE.

JUDGMENTS AND DECREES.

See PLEADINGS AND PRACTICE.

JUDGMENT OF FOREIGN STATE.

Judge's certificate. Under our Code, section 3795, the certificate that the clerk's attestation is in proper form, may be made by any judge, chief justice or presiding magistrate of the State, though he may not be a judge of the court wherein the judgment was rendered. *Pickett v. Boyd*, 498.

JUSTICES OF THE PEACE.

Special constable. A justice of the peace has no power to appoint a special constable to execute a *fi. fa.* *State v. McKiltrick*, 476.

LAND LYING IN TWO COUNTIES.

See PLEADINGS AND PRACTICE.

LANDLORD AND TENANT.

1. *Purchaser of tenant. Lien.* A suit by landlord may be maintained against a purchaser of the crop, or any part thereof, from the tenant before any recovery of judgment against the tenant or before the rent is due. *Richardson & Nelson v. Blakemore*, 290.
2. *Estoppel.* A tenant is estopped to deny his landlord's title. *Campbell v. Hampton*, 440.

LEVY.

See REDEMPTION, EQUITY OF; LIEN; EJECTMENT.

LIBEL.

1. *Ratification.* A person may adopt and ratify an unauthorized signature of his name to a libelous publication. *Dawson and Campbell v. Holt*, 583.
2. *Same.* Mere silence in relation to a libel published over a person's signature, and a failure to disavow it to the injured party within a reasonable time after knowledge of the publishing, are not

LIBEL—Continued.

a ratification of the act as a matter of law, even in a case where the person had signed a writing for publication of which the article published was a condensation and material modification, and had refused to publish a denial. They were facts from which an actual ratification might be found. *Id.*

3. *Evidence.* It is not error in a trial for libel to refuse to allow the defendant to prove that he had uniformly denied that he had signed or authorized the libelous publication, unless the denial was made in the presence of the plaintiff, or brought to his knowledge. *Id.*
4. A publication which contains a single false libelous statement is a libel, although it may contain defamatory statements which were unauthorized, true, or not proved. *Id.*
5. *Agent.* Where authority is given to an agent to publish libelous words, and a publication is caused to be made by that agent in substantial correspondence with these words, the principal will be liable. *Id.*
6. *Same.* Authority to publish a writing to the effect that a person is a troublesome fellow to his neighbors, and has made a particular attempt to hire another to swear falsely, will not authorize a publication that the person is a pest to the community and that there is now overwhelming evidence on file clearly establishing his guilt of subornation of perjury. *Id.*

LIEN.

See CHANCERY PLEADINGS AND PRACTICE; TAXES; CARRIER; LANDLORD AND TENANT.

Execution. Lis pendens. Lost, when. The lien on land of the levy of a justice's execution, and the *lis pendens* created by the filing of the papers in the circuit court for the condemnation of the land, the order of condemnation, and the *supersedeas* of the *venditioni exponas* thereon by the debtor, will be lost by a failure to prosecute the suit for nearly five years, as against an innocent purchaser for value and without notice, who bought the land from the debtor about three years and six months after the commencement of the period of neglect, and the greater part of whose purchase money had been used to pay off other encumbrances. *Mann v. Roberts*, 57.

LIEN OF RECOGNIZANCE.

While since the Code of 1858 no statute of England is in force in this State, yet the principles and rules of law which may originally have grown out of the provisions of ancient English statutes, and been adopted as rules of property and settled principles of law, were not annulled by the Code of 1858, and this court, prior to 1858,

LIEN OF RECOGNIZANCE—*Continued.*

having under such statutes declared that recognizances were liens in the county where taken, this law is still in force, but the lien does not extend beyond the county where the recognizance was entered into. *State v. Miller*, 620.

LIFE TENANT.

See SALE OF LAND.

Remainderman. Taxes paid accruing during the life tenant, and funeral expenses of such tenant, cannot be charged on the remainder estate. *Caldwell v. Hays*, 463.

LIMITATIONS, STATUTE OF.

See PLEADINGS AND PRACTICE; TAXES, MUNICIPAL; CONVEYANCE; CHANCERY PLEADINGS AND PRACTICE.

1. *Actions.* An action against a railroad company for damages for failure to deliver cotton to commission merchant as per contract is not barred within six years. *Louisville & Nashville Railroad Co. v. Neal*, 270.
2. Where heirs recognize claims as subsisting debts against their ancestor's estate, and the deed of trust by which same are secured as an encumbrance, and induced parties to take the debts up by agreeing that they were valid liens, the heirs cannot rely upon statute of limitations as to same. *Lengar and Wife v. Hazlewood*, 539.
3. *New promise.* The holder of a promissory note died, his widow presented the note to the maker before appointment of administrator, who promised that he would pay. Such a promise is not such an acknowledgment of the debt as to take it out of the operation of the statute of limitations. A promise made to a person not entitled to the paper, whether the promisor knew it or not, could in no event inure to the benefit of the party entitled, to whom no promise is made or intended to be made. A promise, to take the case out of the statute, must be made to the holder, or, if to another, such privity must be shown between the party addressed and the creditor, that what was said to the former might fairly be presumed to have been meant to reach his ear and influence his conduct. *Marwell v. Reilly*, 307.
4. *Injunction bond.* The statute of limitation does not begin to run in favor of an administrator of a surety upon an injunction bond, until the injunction is dissolved. *Pickett v. Boyd*, 498.
5. *Husband and Wife. Survivorship. Guardian.* Upon the marriage of a female ward the guardianship ceases, and the husband is at once vested with the right to demand, sue for, and re-

LIMITATIONS, STATUTE OF—*Continued.*

ceive any funds in the hands of the guardian, or any choses in action of the wife, and the period required to create the bar of the statute of limitations, or to raise the presumption of payment would begin to run from that time. And if the wife afterwards take the right of action by survivorship, or divorce, she would take them in the condition in which he had left them. *Lane v. Farmer*, 568.

6. *Seven' years in favor of heirs.* The statute of limitations of seven years in favor of heirs and devisees, Code, sections 2786 and 2281, establishes positive prescriptions, and does not operate upon the remedy merely, but extinguishes the right, and is a conclusive bar, whether pleaded in form or not. *Caldwell & Hays v. McFarland*, 463.

7. *Same. Agreement construed.* An agreement by the devisees with the executors, executed more than seven years before suit brought, to pay *pro rata* any amount found to be necessary to satisfy the indebtedness of the estate, means merely that the devisees will hold the land received subject to their proportion of debts found due, by due course of administration, and does not waive any benefit of the statute, nor remove the bar from a suit brought by the executors more than seven years after administration granted, seeking to subject lands to payment of surplus over personal estate by them expended in satisfaction of the debts of the deviser. *Id.*

LIQUOR DEALERS.

See PRIVILEGES.

LIS PENDENS.

See LIEN.

Commencement of. As to strangers to the suit, *lis pendens* does not commence until the service of process upon the defendant, even though a copy of the bill had previously been read to such defendant by a co-defendant who had been served with process. *Williamson v. Williams*, 355.

LOCAL ACTION.

See PLEADINGS AND PRACTICE.

LOST PAPERS.

See PLEADINGS AND PRACTICE.

MARRIED WOMEN.

See CONVEYANCE.

Sale of personalty. A married woman without estate buys a stock of goods from a trustee under an assignment by her husband. Creditors

MARRIED WOMEN—*Continued.*

of husband levy upon the goods. *Held*: She had the right to purchase, and there being no fraud, the sale was valid. *Cheatham, Pearce & Co. v. Thornton*, 295.

MARRIAGE SETTLEMENT.

Construction. Marriage settlements must be construed in the light of surrounding circumstances, and in view of the object and purpose of the contract; and when such settlement expresses that its object was "to secure the wife from want," an absolute right of disposition in the husband must be made to appear by express provision or *necessary* implication. *Lippman v. Boals*, 489.

MARSHALING SECURITIES.

See HOMESTEAD.

MASTER AND SERVANT,

1. *Defective tools. Relative duties.* The duty of the master is absolute to use active diligence to prevent improper or unsafe tools or implements being furnished an employee by which he may be injured. The servant must use reasonable diligence in guarding against such injuries, but he may well rely, to some extent at least, on the faithful performance of duty on the part of his employer, and what might be ordinary care in avoiding an independent danger, might well not be required to guard against a breach of duty on the part of the master which the servant had no reason to anticipate. *Guthrie v. Louisville & Nashville Railroad Co.*, 372.
2. *Same. Case stated.* Where a laborer upon a railroad, engaged in driving spikes, is furnished by the section-boss with an iron maul known by the section-boss to be defective, and is injured in consequence of such defect, the company is liable, although the defect was patent and would have been known to the servant had he inspected the maul. *Id.*

MECHANICS' LIEN

See HOMESTEAD.

MERCHANT TAILORS.

See PRIVILEGES.

MORTGAGE

See HOMESTEAD.

NEW-PROMISE.

See LIMITATIONS, STATUTE OF.

NON-RESIDENTS.

See CHANCERY COURT JURISDICTION.

NON-RESIDENT HEIRS.

See SUPREME COURT PRACTICE.

NOTICE.

See DEPOSITIONS; LIS PENDENS.

Execution. Notice. To entitle a defendant whose land is being sold by the sheriff under execution, to notice, under Code, section 3042 the defendant must not only be in possession of the land, but in actual occupation. *Caristian v. Mynatt*, 615.

PARTNERSHIP.

See ADMINISTRATOR; CHANCERY COURT JURISDICTION.

1. *Surviving partner. Individual creditors.* A partnership is dissolved by the death of a partner, and if the surviving partner purchase goods afterwards and add to the partnership assets, such purchases are the individual assets of the surviving partner, and are first liable to the satisfaction of the individual creditors of the surviving partner. *Cowan, McClung & Co. v. Gill*, 674.
2. *Same. Commingling assets.* If the surviving partner commingle his individual property with the firm assets, his individual creditors do not thereby lose their lien on the property, but an account will be ordered to ascertain the amount of individual and partnership assets. *Id.*
3. *Joint and separate creditors.* If a partner is indebted to the firm, or has taken more than his just share of the joint funds, the joint creditors will not be admitted to prove against the separate estate of that partner until his separate creditors are satisfied, unless it be shown he acted fraudulently with a view to benefit his separate creditors. *Id.*

PAYMENT.

See DAMAGES; TAXES, MUNICIPAL.

PLAT AND SURVEY.

See EJECTMENT.

PLEA.

SEE SUPREME COURT PRACTICE.

PLEADING AND PRACTICE.

See GARNISHMENT; TAX ASSESSMENT; RAILROADS; EMPLOYER AND EMPLOYEE; LANDLORD AND TENANT.

PLEADINGS AND PRACTICE—*Continued.*

1. *Pleadings.* The statute of limitations of six years must be specially pleaded. *State v. Butler*, 418.
2. *Severance.* Where a right to a joint action is given by statute, the courts have no discretion to grant a severance. *Taylor v. French*, 136.
3. *Trial by jury. Amendment.* Pleadings which fail to ask for trial by jury cannot be amended by asking for a jury at a subsequent term, and it is error to allow the amendment. The failure to demand a jury by either party is conclusively held to be an agreement to try without a jury. *Franklin v. McCorkle*, 190.
4. *Bonds and coupons. Suit upon coupons. Guarantor.* The City of Memphis issued bonds, with coupons for interest. The Memphis & Charleston Railroad Company endorsed upon the bond a guaranty of prompt payment and interest. *Held*, a holder of a detached coupon may sue the guarantor in his own name, and he is not required to use the name of the holder of the bond. *Taylor v. Memphis & Charleston Railroad Co.*, 186.
5. *Judgments and decrees. Collateral attack. Evidence.* It is the settled law of this State that domestic judgments of courts of general jurisdiction cannot be collaterally attacked by evidence outside of the record itself. *Harris v. McClanahan*, 181.
6. *Same. Same.* A recital in a domestic judgment or decree of a court of general jurisdiction that the original process was served on the defendant, or that publication, when allowed in lieu of service of process, was made, or that the party appeared by attorney or by answer, is conclusive when the record is collaterally put in issue, unless the recital is positively contradicted by the record itself. *Id.*
7. *Same. Lost process. Evidence.* If the original process be lost, the testimony of the party cannot be permitted to avail against a recital in the judgment or decree of the fact of service, even in a direct attack, although the rule docket is silent on the subject. *Id.*
8. *Statute of limitations. Executors.* In an action upon a covenant of warranty of title to land against two executors of the will of the covenantor, one of whom was made a party and served with process within two years of the eviction, and the other was not made a party until after the lapse of that period of time, the plea of the statute of limitations of two years is not a good defense to either; nor, *a fortiori*, to the personal representative of another covenantor properly sued with them, and served with process within the two years after eviction. *Burgie v. Parks*, 84.
9. *Collateral attack.* In a suit upon a judgment, the judgment cannot be attacked for mere irregularities. *Pickett v. Boyd*, 498.

PLEADINGS AND PRACTICE—*Continued.*

10. *Ejectment. Privity of estate. Charge of court.* A plaintiff in ejectment cannot recover upon a demise in the name of third persons between whom and himself there is no privity of title or estate, and if in fact there is no proof to that effect, it is not error for the court to charge the jury that the plaintiff is not claiming title through those persons, or at least has introduced no proof tending to show that there is any privity of estate or title between him and them. *Slatery v. Lea*, 9.
11. *Same* The trial judge may require counsel to reduce the answers of witnesses to writing, and to read each answer over to the witness before proceeding with other questions. *Jones v. State*, 468.
12. *Misnomer.* A corporation may be known by several names, and can only take advantage of a misnomer by a plea in abatement, and no defense on this ground is admissible after a step in the cause recognizing the identity of the corporation sued with the corporation defending. *Railroad v. Reidmond*, 205.
13. *Bill of exceptions.* If the circuit judge, in a case tried by him without a jury, find the facts established by the evidence, and embody them in a bill of exceptions without objection by the parties, the objection cannot be taken that the bill of exceptions does not contain all the evidence. *Huffman v. Hughlett & Pyatt*, 549.
14. *Tort feasons. Waiver.* The commencement of an action by the injured party against one of a series of tort feasons, upon the implied promise arising from the conversion of personalty, will not be a waiver of his rights against the other tort feasons. *Id.*
15. *Conversion.* If the circuit judge, who tries a case without a jury, finds that one of two defendants converted the personalty in controversy, and sold it to the other defendant without authority of the plaintiff, the owners, the findings of fact will warrant the conclusion by him that the latter defendant had also converted the property. *Id.*
16. *Lost justices' warrant. How supplied.* When an original justices' warrant has been lost or destroyed, the circuit court cannot condemn land until the warrant is supplied; and this cannot be done by the justice certifying to a copy of the original warrant. *Hulliburton v. Jackson*, 471.
17. *Suit to recover money lost at gaming.* A husband may bring a suit for the use of his wife to recover money lost at gaming, after the expiration of ninety days and before the expiration of twelve months. *Forrest v. Grant*, 305.
18. *Exceptions to report.* Upon a petition to take private property for works of internal improvements, the proper time and way to make ob-

PLEADINGS AND PRACTICE—*Continued.*

jections as to want of title, of proper parties, etc., is by exceptions to the report when filed. *Camp v. Coal Creek & Winter's Gap Railroad Co.*, 705.

19. *Appeal.* An appeal will not lie from an order directing a writ of inquiry of damages. *Id.*

20. *Evidence. Request for delay.* Whether or not a conversation between a creditor and an administrator amounted to "a request for delay," so as to prevent the running of the statute of limitations, is a mixed question of law and fact to be determined by the jury under a proper charge; if the evidence tend to establish such a request, it must be given to the jury, who are to determine its sufficiency. *Apperson v. Pattison*, 484

21. *Evidence. Insolvency.* Evidence showing the amount involved in a suit and the interest of the decedent in it, is inadmissible in a suit between his administrator and one who acted as his body-guard but rendered no other assistance, while decedent was engaged in preparing and securing evidence for such suit. *Id.*

22. *Limitations. Onus probandi to remove bar.* The burden of proof of facts necessary to remove the bar of the statute of limitations, which *prima facie* exists, is on the plaintiff. *Id.*

23. *Ejectment. Third person only admitted to contest merits.* In an action of ejectment, after issue joined on pleas of not guilty, a third person admitted, on his own application, as a party defendant, cannot plead in abatement that the original defendants were not served with copy of declaration; he can only plead to the merits. *Campbell v. Hampton*, 440.

24. *Local action. Land lying partly in two counties. Attachment. Jurisdiction.* By section 2810 of the Code (act of 1847-8, ch. 173), it was intended that where a tract of land lies in two counties, all of which is subject to the same claim or demand by a party, he might enforce that demand against the whole by suit begun in either of the counties in which part of the tract lies; and in such case the right to the whole would be passed, although part of it was in a different county from that in which the suit was pending. *Id.*

25. *Replevin. Receiver.* A creditor obtained a judgment in circuit court against Bryant & Newhouse, and execution was issued thereon. The goods of Bryant & Newhouse were then attached by bill in chancery court, and a receiver appointed. The officer levied the execution upon the goods, and the receiver brought an action of replevin in circuit court to recover possession. *Held:* That under the facts of this case, the dignity of the chancery court, within the same jurisdiction, cannot be asserted by an action of replevin in a common

PLEADINGS AND PRACTICE- *Continued.*

law court, against a party having in fact a superior right to the possession of the property. *Conley & Harrison v Deere, Munsure & Co.*, 274.

26. *Slander. Appeal. Forma pauperis.* The plaintiff in an action for slander, cannot prosecute appeal *in forma pauperis*. *Cox v. Patton*, 545.

27. *Bond, attachment.* The bond which is required upon suing out an attachment, and which the statute directs shall be made payable to the defendant, will enure to the benefit of each and all of several defendants who may be aggrieved, and among others to the benefit of the defendant whose property is attached as the property of the debtor, although the bond be made payable to one defendant named "*et al.*" *Renkert v. Elliott*, 235.

28. *Same.* If one defendant alone is aggrieved, he may sue in his own name avowing in his declaration that the other defendants had no interest in the damages claimed, or in the name of all of the defendants for his use, and the suit may be continued in his own name if the other plaintiffs die, or if, at the instance of his adversary, the trial court compels him so to do. *Id.*

29. *Same.* Under attachment bond which follows the words of the statute, the obligors are liable to each defendant severally if each have a several interest, and the surety for each of his principals severally as well as jointly. *Id.*

30. *Attachment. Penalty of bond.* An attachment sued out under the Code, section 4283, *et seq.*, is not a jurisdictional writ, and abides the event of the suit unless sooner discharged by the court. But such an attachment ought not to be discharged *in toto* for the failure to increase the penalty of the bond, but the levy should be reduced so as to be within the penalty. *Id.*

31. *Attachment bond. State not required to give.* The State cannot be required to give an attachment bond, and no liability can be created on the part of persons purporting to execute a bond as sureties. *Id.*

32. *Same. Damages.* Where an attachment bill has been filed by a creditor against his debtor, to reach property alleged to be held by a third person under a title fraudulent as to the creditor, the question whether the attachment was wrongfully sued out as to such person is not tested by a discharge of the attachment for the want of an increased bond, or by the dismissal of the suit at the cost of the defendants because the creditor's debt had been paid, or satisfied even by a compromise. In such a case, the question may be made in a suit for the damages occasioned by the wrongful suing out of the attachment. *Id.*

33. *Same. Exemplary damages.* In a suit on an attachment bond against a surety, the plaintiff is not entitled to recover exemplary damages

PLEADINGS AND PRACTICE—*Continued.*

unless the principal is fixed with malice, or a wrongful abuse of the process. *Id.*

34. *Attachment. Damages. Surety on bond.* Since the adoption of the Code a suit for damages against a creditor for the wrongful suing out of an attachment is an action on the facts of the case, and the measure of damages is precisely the same as in a suit upon the attachment bond, malice and a want of probable cause going in aggravation, and a judgment in such a case on the merits in favor of the defendant is conclusive between the parties, and will enure to the benefit of the surety, and may be relied on as *res adjudicata*, under the general issue in an action upon the bond. *Id.*

PEDIGREE.

See EVIDENCE.

PHOTOGRAPHERS.

See EXEMPTION.

PRESCRIPTION.

See EASEMENT.

PRESUMPTION.

See FRAUD.

PRIVILEGE.

See SOCIAL CLUBS.

PRIVILEGE TAX.

1. *Liquor dealers.* A wholesale liquor dealer is one who sells to purchasers in packages or quantities for the purpose of trade or to be resold. A retail dealer is one who sells to persons or consumers for the purpose of consumption. *Webb v. Baird*, 667.
2. *Dealers in futures.* A person who receives orders to buy or sell in New York or elsewhere, produce for delivery at a future time, who executes these orders through correspondents, he having no pecuniary interest in the transaction further than charging commissions is a dealer in futures, and under the act of 1883 is liable to a tax of \$1,000. *Memphis Brokerage Association v. Cullen*, 75.
3. *Retail and wholesale liquor dealer.* A retail dealer is one who sells by small quantities to suit customers articles which are bought in larger quantities generally. A wholesale dealer is one who sells in gross and not by the small quantity to consumers. *Id.*, 13.

PRIVILEGE TAX—*Continued.*

4. *Merchant tailors* Merchant tailors are required to take out license as a merchant. *Murray v. State*, 218.
5. *Manufacturers of Whisky.* Manufacturers of whisky and brandy out of products of farms and orchards in the State, who sell by wholesale, are liable for the privilege tax imposed upon wholesale liquor dealers. *Webb v. State*, 662.

RAILROADS.

See EASEMENT; MASTER AND SERVANT; DAMAGES.

1. *Schedule regulations.* A railroad has the right to make reasonable regulations for running its trains, and if a purchaser of a ticket has notice of same, or the railroad company had given such publicity to same in the ticket office, and by posters in the cars, that a person of ordinary intelligence, by the use of reasonable care and caution, would or might obtain all requisite information, then he is bound by the regulations. *Trottinger v. East Tennessee, Virginia & Georgia Railroad Co.*, 533.
2. *Waiver by railroad company of rights under schedule.* The railroad company did not waive its rights under such regulations by the conductor punching and taking up the ticket after having told the holder that the train did not stop at his place of destination, the ticket holder being on a train which, according to the schedule, did not stop there. *Id.*
3. *Waiver.* There can be no waiver unless so intended by one party and so understood by the other, or one party has so acted as to mislead the other. *Id.*
4. *Statement of case.* The plaintiff purchased a ticket at reduced rates from agent of defendant at W to go to N and return, signing a contract endorsed on the ticket to make a continuous journey each way. By the regular schedule for several months the mail trains at night did not stop at W; the plaintiff resided near W, and was frequently there, but testified he did not know said mail train did not stop there, and had seen notices and posters in the depot, but had not read them. On his return trip he got on said mail train at C and came to K, where a new conductor took charge of the train, to whom plaintiff presented his ticket, when said conductor told him the train did not stop at W, and he could not put him off there. Plaintiff requested a check to get off at M, which was refused. The conductor punched and took up the ticket. The train did not stop at W but went on to R some miles beyond, the conductor exacting regular fare beyond W. *Held*, the plaintiff was not entitled to recover. *Id.*
5. *Statutory precautions.* The provisions of the Code, section 1166, sub-sec. 5, prescribing the duty of a railroad company when an animal appears on the road to prevent an accident, do not apply in

RAILROADS—*Continued.*

a case where the injury to stock is not the direct result of the moving train, and the company is not liable for an accident in which they were innocent of all blame, merely because one of the requirements of the statute was not complied with. *Holder v. Chicago, St. Louis & New Orleans Railroad Co.*, 176.

6. *Same.* Where, therefore, a mule jumped on the track of a railroad company in front of a moving train, ran on the road for two hundred yards, and then on a trestle, from which it leaped and was killed, the train being stopped before reaching the trestle, it was not error to charge the jury: "If you find that the defendant's train was stopped before it reached or overtook the plaintiff's mule, and that the mule was frightened at the time, and ran along the track of defendant's road, and jumped off and killed itself, the defendant would not be liable even if all the statutory precautions were not complied with by the defendant. *Id.*"
7. *Contract. Shipping stock.* A railroad company shipped a car of stock and the contract to ship provides: "And it is further agreed, that in case of accident to or delay of time from any cause whatever, the owners or shippers are to feed, water and take proper care of stock." The circuit judge charged that in all cases of unavoidable delay, the railroad was by the contract, obligated to feed and water the stock. This was error. The terms of the contract only provide that the owner or shipper shall feed and water the stock in certain defined emergencies, and does not undertake that, in all other cases the carrier shall do so. *Louisville & Nashville Railroad v. Trent*, 82.
8. *Condemnation of land. Interest. Pleadings and practice.* Where petition was filed under section 1326, *et seq.*, of the Code, to have damages assessed to plaintiff by reason of the road passing over petitioner's land, and after years of delay in litigation, commissioners or a jury were appointed by the circuit court to assess damages, no directions being given as to interest, the jury fixed the damages and made their report, which was excepted to because no interest was allowed. *Held*, the case was not tried as a jury case, but the court acted on the report and the facts therein stated as in equity, and the action of the court does not have the effect of the finding of a jury, and that interest might be allowed. *East Tennessee, Virginia & Georgia Railroad Co. v. Burnett's Executors*, 525.
9. *Obstruction.* To constitute an obstruction within the meaning of the statute prescribing the duties of a railroad company when a person, animal or other obstruction appears upon the road, the animal must be in a position to be struck or directly injured by the train while moving on the rails. *Railroad v. Reidmond*, 205.
10. *Same. When statute does not apply.* The statute does not apply when the animal appears on some other part of the company's right

RAILROADS—*Continued.*

of way, and the duty of the company in such a case is regulated by the principles of the common law. *Id.*

11. *Same. Same.* Where an animal was on the company's right of way, six or eight feet from the end of the cross ties of the track, with its head turned from the road, and an unobstructed egress in that direction, it was error to charge the jury that it was the duty of the lookout to watch over the entire right of way, and whenever animals on any part of it are seen, to sound the whistle to frighten them away. *Id.*
12. *Purchase of tickets. Evidence.* In an action by a passenger against a railroad company for wrongfully putting him off the train for failing to pay the fare demanded, it is competent to prove by himself and other witnesses that they had traveled over the road between the termini of the plaintiff's trip, with and without tickets, and never paid more than the plaintiff tendered to the conductors. *Louisville, Nashville & Great Southern Railroad Co. v. Guinan*, 98.
13. *Regulation about tickets.* A railroad company may, by a regulation of which the public are duly notified, establish a higher rate of fare if paid on the cars than in the purchase of a ticket for the same trip, but the fare can in no event exceed the charge limited by the charter. *Id.*
14. *Damages.* Actual compensation is the measure of damages in all instances in which the nature of the case admits of the rule. *Id.*
15. *Same. Exemplary.* Exemplary damages are allowed when the wrongful act is done with a bad motive, or so recklessly as to imply a disregard of social obligations, or where there is negligence so gross as to amount to positive misconduct. The turpitude of the defendant's conduct is alone considered, and there must be a wrong intent on his part, or the wrongful execution of a *bona fide* intent. *Id.*
16. *Same. Same. Removing passenger from train for non-payment of fare.* Where, therefore, a passenger was removed from the car of a railroad company for the non-payment of the fare demanded by the conductor, acting in good faith and under instructions from the company, in a peaceable manner, without any improper conduct on the part of the conductor, the passenger would not be entitled to exemplary damages unless the act was done with a malicious intent on the part of the company or its employees to defraud or oppress the defendant, or passengers in his situation. *Id.*

RATIFICATION.

See LIBEL.

RECEIVER.

See CHANCERY PLEADINGS AND PRACTICE; PLEADINGS AND PRACTICE.

REDEMPTION, EQUITY OF.

See CHANCERY PLEADINGS AND PRACTICE.

Levy of execution. The equity of redemption of a judgment debtor in land sold by execution is not leviabie by another execution against the person to whom he has conveyed his interest in the land, nor will the redemption or purchase of the land by the grantee after the second levy and sale relate back so as to give the purchaser at the second execution sale a good title. *Smith v. Taylor*, 738.

REGISTRATION.

See DEED IN TRUST.

REMAINDER-MAN.

See LIFE TENANT.

REMOVAL OF COUNTY SEATS.

See CONSTITUTIONAL LAW.

RENT.

See LANDLORD AND TENANT.

Sale of land. Upon a sale of land by the chancery court the purchaser is entitled to rent from the time when the right of possession attaches. If the decree of confirmation postpones the possession of the purchaser, he will not be entitled to rent from confirmation, but from right to possession. *Latta v. Pierre*, 267.

REPLEVIN.

See PLEADINGS AND PRACTICE; CARRIER.

RESULTING TRUST.

See FRAUD; GUARDIAN AND WARD.

REVIVOR.

See SUPREME COURT PRACTICE.

SALE OF LAND.

See CHANCERY PLEADINGS AND PRACTICE; TAXATION; RENTS; NOTICE; TAXES.

Life tenant and remainderman. Appeal. Revivor. S sold a tract of land to J, in which, under a will, his wife had a life estate, and, by the terms of the will, upon her death vested in her son. S, his wife and

SALE OF LAND—*Continued.*

son, then of age, executed a title bond and afterwards a deed. Upon proper pleadings, it was held by the chancellor that the sale was void as to the wife. An appeal was taken, and before hearing the wife died. *Held*: That the sale was void as to wife, but she having died pending the appeal, the son was bound by the deed, and the sale was sustained. *Springfield v Jackson*, 348.

SALE OF PERSONALTY.

See MARRIED WOMEN.

SALE OF PROPERTY OF PERSON UNDER DISABILITY.

See CHANCERY PLEADINGS AND PRACTICE.

Witnesses. Upon application for the sale of property of persons under disability, a witness who testified that he had agreed to purchase at a designated sum, may purchase at the sale of such property and the sale will not be void under sec. 3339 of Code. *Hunt v. Glenn*, 16.

SHERIFF.

See GARNISHMENT.

1. *Duty of sheriff under order of sale in attachment proceeding.* Where order of sale is regularly issued by a justice in attachment proceeding, the officer is bound to sell, though title to the property is disputed, and the plaintiff does not give indemnity bond. The order of the court having custody of the property is complete protection to him in making the sale. If attachment proceedings are irregular, but not void, the sheriff must execute the order of sale. *State v. Manly* 636.
2. *Statement of case.* In an action on sheriff's bond for failure to execute and return order of sale issued by a justice of the peace in attachment proceedings, the officer returned the order endorsed, "I went on to sell the corn, and it was disputed, and I would not sell without a bond." *Held*, the officer could not require indemnity bond in such case, and he was liable. *Id.*
3. *Special deputy sheriff.* A special deputy sheriff appointed for one year to preserve the peace and prevent infractions of the law, and to make arrests and deliver all prisoners to the county jail, is a civil officer within the meaning of the Code, sec 4750, and entitled to the sum of \$50 in the bill of costs for arresting and prosecuting to conviction any person guilty of the offenses mentioned therein. *Reves v. State*, 124.

SHIPPING STOCK.

See RAILROADS.

SLANDER.

See PLEADINGS AND PRACTICE.

SOCIAL CLUBS.

Selling liquors. A social club organized under the act of 1875, ch. 142, section 1, sub-sections 3 and 5, maintained a library, gave musical entertainments, afforded meals for its members, and kept a small stock of liquors, which were for the use of its members, members paying for each drink as it was taken, but no profit was made for the club upon the liquors, the stock of which was in part kept up by the monthly dues of members. *Held*, the club was not liable to pay a privilege tax as a retail liquor dealer. *Tennessee Club of Memphis v. Dwyer*, 452.

STATE NOT TO GIVE SECURITY.

See PLEADINGS AND PRACTICE.

STATUTES CONSTRUED.

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SUIT UPON COUPONS.

See PLEADINGS AND PRACTICE.

SUITS AGAINST COUNTIES.

See COUNTY WARRANTS.

SUPREME COURT PRACTICE.

1. *Evidence. General exception.* Where the ruling of the trial judge in rejecting testimony indicates that he understood it to be offered for a purpose for which it was inadmissible, he cannot be put in error by a mere general exception, which does not call to his attention an-

SUPREME COURT PRACTICE—*Continued.*

other purpose for which it would have been admissible. *Jones and Perry v. State*, 468.

2. *Proper exercise of discretion presumed.* The presumption is always in favor of the proper exercise of judicial discretion in the conduct of a trial, and it must affirmatively appear that injustice has been done before the Supreme Court will reverse for the abuse. *Id.*
3. *County warrants. Pleadings and practice. Supreme Court practice.* Whether county warrants are instruments of such a character that suits may be predicated upon them is not determined in this case. No such objection was raised in the court below, and such objection cannot be made now in the Supreme Court. The same is true as to the objection that county warrants are not negotiable, and suit cannot be maintained in name of assignee. *Gibson County v. Rains*, 20.
4. *Motion to quash.* The Supreme Court will not notice a motion to quash a warrant which fails to state any ground for the motion. *Railroad v. Reidmond*, 205.
5. *Reversal.* The manner of the examination of witnesses is left largely to the discretion of the trial judge, and the Supreme Court will not reverse unless it affirmatively appear he has committed error. It is not error for the trial judge to say to counsel, in the presence of the jury, that he is treating a witness unfairly and harshly, and that *there was nothing wrong or improper in her conduct* to justify such treatment, where it is plain such remark had reference to the demeanor and not to the testimony of the witness. *Carroll v. State*, 480.
6. *Reversal. Verdict against evidence.* The Supreme Court will not grant a new trial on a mere preponderance of evidence against the verdict. *Campbell v. Hamilton*, 440.
7. *Revivor. Non-resident heirs.* The non-resident heirs of the appellant in an action of replevin, who was the defendant below and who died pending the appeal in this court, may revive the suit in their names, if no person will administer on the estate in this State. *Campbell v. Hubbard*, 6.
8. *Same. Plea.* Upon motion made to revive, the appellee may plead that the persons moving are not the heirs or all the heirs of the deceased, and, upon issue joined on the plea, the proof of heirship may be made in open court, or by depositions taken on notice, or before the clerk upon a reference to him for the purpose, the latter being the most convenient mode. *Id.*
9. *Same Same.* It is not a good plea to the motion to revive that the appellant had made a will in the State of his domicil, which had been probated in that State, and that certain persons named therein had qualified as executors thereof under the laws of that State. *Id.*

SUPREME COURT PRACTICE—*Continued.*

10. *Innocuous error.* The Supreme Court will not reverse merely because the circuit judge has erroneously charged upon pleas in support of which no evidence was introduced. *Railroad v. Hays*, 382.
11. *Objections to evidence must be special.* In order to put the court in error in the admission of testimony, the specific objection to it must be pointed out. *Pickett v. Boyd*, 498.

SURETY.

See CHANCERY PLEADINGS AND PRACTICE; PLEADINGS AND PRACTICE; BOND; APPEAL.

SURFACE WATER.

See EASEMENT.

SURVEYOR.

See CHANCERY PLEADINGS AND PRACTICE; CHANCERY COURT JURISDICTION.

SURVIVORSHIP.

See LIMITATIONS.

TAXATION.

1. *Assessment.* If the description of land in the assessment for taxation is not sufficient to identify the land the assessment is void; and a sale under such assessment is void; and the defect is not cured by the land being accurately described in the report of sale. *Mayor and Aldermen of Morristown v. King and Wife*, 669.
2. *Same. Tracts not contiguous.* Where several pieces of property not contiguous were assessed in the name of the same person, it was illegal to sell one for taxes assessed upon all. *Id.*

TAX ASSESSMENT.

1. *Tax collectors. Pleading and practice. Constitutional law.* The act of 1879, ch. 79, which empowers tax collectors to assess all property which has not been assessed, and to proceed to collect the taxes, expressly provides that the suit for these taxes shall be commenced by warrant before a justice; that the warrant may be for the State, county and municipal taxes jointly or separately, and confers upon the justice jurisdiction in all such cases, no matter what may be the amount. These details are all included in the subject of the caption, which is "An act for the more rigid collection of the revenue." *Wilson v. Benton*, 51.
2. *Pleadings and practice.* The statute does not require that the warrant should show or be accompanied with the authority under

TAX ASSESSMENT—*Continued.*

which the suit is brought for the respective taxes, and a motion to dismiss for want of such authority would not lie. The mode of raising the question would be by a rule on the tax collector to establish his authority, upon a *prima facie* showing of the want of authority by affidavit or otherwise. *Id.*

3. *Assessment. How made by tax collector.* The assessment of the omitted property may be made by the tax collector in writing on a sheet of paper, specifying the property and its assessed value, dated and officially signed, accompanied by a statement of the amount of tax thereon due the State, county and municipality. *Id.*
4. *Same. May be made. When.* The assessment may be made by the tax collector whose duty it was to collect the taxes for the given year, at any time during his official term. *Id.*

TAXES.

See CONSTITUTIONAL LAW; HOMESTEAD; CORPORATION, MUNICIPAL; TRUSTEE; PRIVILEGE; LIFE TENANT.

1. *Assessment; Exemption.* A railroad was by charter exempt from taxation for twenty years, which ended in March, 1877. The taxes assessed for 1877 were assessed in April. The company paid a *pro rata*. *Held:* The company was liable for all the taxes assessed for 1877. When the taxes were assessed no exemption existed. *McClellan v. Memphis & Charleston Railroad Company*, 336.
2. *Act of 1882 construed.* An act of the Legislature of April 26, 1882, entitled, An act to provide for the more efficient collection of back taxes, is a special remedy, and must be strictly pursued. A purchaser at a sale made under said act will be relieved of his purchase unless the requirements of the act are followed. *State v. Woodruff*, 300.
3. *Lien. Bank of Tennessee.* The purchase of land by the Bank of Tennessee does not extinguish pre-existing tax liens. *State of Tennessee and County of Shelby v. Ewing*, 172.

TAXES, MUNICIPAL,

Statute of limitations. Presumption of payment. The general statute of limitations is no defense to the enforcement of its taxes by a municipal corporation, nor will the lapse of time or laches of the city officials prevent the recovery of a tax properly assessed if clearly shown to be unpaid, but the lapse of time, in connection with other circumstances, may raise a presumption of fact that the tax has been paid, which will establish the defense of payment unless rebutted. *Elliott v. Williamson*, 38.

TAX COLLECTORS.

See TAX ASSESSMENT.

TORT FEASORS.

See PLEADINGS AND PRACTICE.

TRIAL BY JURY.

See PLEADINGS AND PRACTICE.

TRUSTEE.

Compensation. Sale of land. The trustee of Shelby county is entitled to a fee of fifty cents upon each tract of land sold by him and bought by the Treasurer for delinquent taxes, levied for the Taxing District of Memphis. *Trustee v. Taxing District*, 162.

USAGE OF TRADE.

See BAILMENT.

WAIVER.

See RAILROADS; PLEADINGS AND PRACTICE.

WARRANTY.

See FRAUD.

WIDOW.

See DOWER.

WILLS.

1. *What constitutes.* All that is required to constitute "a paper writing appearing to be the will of a deceased person," within the meaning of the Code, sec. 2163, is that the writing should purport to be a disposition of the writer's property after death. *Reagan v. Stanley*, 316.
2. *Valuable papers.* Valuable papers, within the meaning of the same section, are not papers having a money value, but only such as "are kept and considered worthy of being taken care of by the particular person." *Id.*
3. *Holographic.* Entries in a continuous diary purporting to make a disposition of the writer's property after death, written and signed by him, the handwriting being proved as required by statute, may be probated as a holographic will. *Id.*
4. *Handwriting.* An entry in a continuous diary, written by the party himself, purporting to make a disposition of his property after death, may be set up as a will of personalty, although not signed nor attested, if the handwriting be sufficiently proved. *Id.*
5. *Revocation.* All wills are of equal grade or solemnity to the extent of their valid provisions after probate, and, therefore, a later

WILLS—*Continued.*

informal will, neither signed nor witnessed, set up as to personalty. will to that extent revoke a prior holographic will. *Id*

6. *Rule in Shelly's case.* Where the testator bequeathed land to trustees for the sole use and benefit of his son J., "and after his death for the like use and benefit of his heirs-at-law": *Held*, within the rule in Shelly's case, and that as the will was made, and the testator died before the act of 1851-2, abolishing the rule in Shelly's case, it should be construed according to the law at the time the will took effect under which J. took the absolute estate. *Williams v. Williams*, 652.
7. *Construction.* A clause of the will provides as follows: "I give and bequeath to my oldest son, James A. Thomas, the fifty-five acres he now lives on during his natural life, provided he has no children, and if he should have children, I give and bequeath it unto them, and in case he should have no children at his death, it is to return back to my then living children, *unless* he should fail to pay Thomas D. Thomas a note of hand that I stood his security for \$150 bearing interest from date, and if he fails to pay the note, the said land is to be sold and pay it." *Held*, that the children of Thomas had no interest in the land, he having failed to pay the note. The estate never vested in the father, nor gave any right to the children, until the condition was performed. *Thomas v. Northcross*, 345.
8. *Construction.* Ordinary words conveying the absolute title, will not, without superadded words giving unlimited power of disposition, defeat an executory devise. *Read v. Watkins*, 158.
9. The second and third clauses of the will of Francis King are as follows: "I give and bequeath to my wife Lucy the house and farm and survey pertaining thereto of sixty acres, with cattle," etc. "I bequeath to my children the balance of my perishable property and the farm and fifty acres of land, the lower survey, the place where Thomas Bruce now lives, to be equally divided among themselves." On demurrer to the bill filed by the heirs of said Francis King, after the death of his widow, claiming the lands, it was held "there being nothing in this language or context of the will indicative of a contrary intention, it is clear, nothing more appearing, the entire estate of the testator passed to his wife by the second clause." But it being insisted that the lands set out in said claims is the same, the court being unable to determine as to the fact, overruled the demurrer and remanded the cause for answer and proof. *King v. Miller*, 633.

WITNESSES.

See SALE OF PROPERTY OF PERSONS UNDER DISABILITY.

WORK-HOUSE.

See CONTEMPT.

See S. N. S.

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